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IN THE

Supreme Court of the United States

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; JOSEPH MAZURKIEWICZ, Superintendent of State Correctional Insitution at Rockview; GERALD J. PAPPERT, Attorney General of Pennsylvania,

Petitioners,

v.

ANTUAN BRONSHTEIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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FORMER CAPITAL CASE

QUESTIONS PRESENTED

1. May a federal habeas court, consistent with the structure of habeas law and the underlying principles of finality, comity and federalism, declare "inadequate" any state rule that, in the opinion of the federal judge, was "uncertain" in application to a particular set of facts?

2. Is a state one-year deadline for collateral review an "adequate" procedural bar within the meaning of federal habeas law, where the time limit is set by a state statute, the statute speaks in unmistakable terms, the deadline is strictly and uniformly applied by the state courts, and the prisoner has actual notice of the time limit?

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ORDERS AND OPINIONS BELOW

The April 14, 2005, judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the order of the district court in part and reversing in part, is reported at 404 F.3d 700 (3d Cir.), and is reprinted in the Appendix at 1a-74a. The July 5, 2001, order of the district court granting the Petition for Writ of Habeas Corpus is reported at 2001 WL 767593 (E.D. Pa.), and is reprinted in the Appendix at 88a-151a.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a Pennsylvania prisoner who has been sentenced to death. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated April 14, 2005, affirming in part the order of the district court granting Antuan Bronshtein's Petition for Writ of Habeas Corpus, reversing in part, and ordering the state to give Bronshtein a new sentencing hearing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 9545 of The Pennsylvania Post-Conviction Relief Act (PCRA) reads as follows:

§ 9545. Jurisdiction and Proceedings.

* * *

(b) Time for filing petition. –

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S. § 9545 (Purdons 1998).

STATEMENT OF THE CASE

On January 11, 1991, respondent Antuan Bronshtein robbed and murdered Alexander Gutman, a jeweler, in a store owned by Mr. Gutman in the Valley Forge Shopping Center in Upper Merion Township, Montgomery County, Pennsylvania. Bronshtein stole approximately $60,000 worth of jewelry during this crime. Approximately five weeks later, on February 19, 1991, Bronshtein robbed and murdered another jeweler, Jerome Slobotkin, in Philadelphia. Several eyewitnesses placed Bronshtein at the scene of the Gutman

murder, and police found a number of Bronshtein's fingerprints and his palmprint on one of the display cases in Mr. Gutman's store. Bronshtein told an accomplice in the Slobotkin murder that he had murdered another jeweler as well (presumably Mr. Gutman). Although Bronshtein initially confessed to the Slobotkin murder, he later changed his story, and denied involvement in either shooting. He admitted that he knew Mr. Gutman (as well as Mr. Slobotkin), but maintained that he had never been to the Valley Forge Shopping Center store, despite the physical evidence and eyewitnesses linking him to the scene. Instead, Bronshtein told police that both victims had been murdered by a high-ranking assassin from what Bronshtein referred to as the "Russian mafia." Bronshtein identified the real killer as "Mr. X."

Bronshtein was tried separately for each killing. In Philadelphia, he was convicted of first degree murder and sentenced to life in prison for killing Mr. Slobotk[illegible]. In Montgomery County, in the conviction at issue in this case, he was found guilty of first degree murder and sentenced to death for the murder of Alexander Gutman on April 22, 1994.

Bronshtein appealed his conviction to the Pennsylvania Supreme Court. He raised 16 claims of error. The Court denied his appeal on March 25, 1997, Commonwealth v. Bronshtein, 691 A.2d 907 (Pa. 1997), and this Court denied *certiorari* on October 20, 1997, Bronshtein v. Pennsylvania, 522 U.S. 936 (1997). Governor Thomas J. Ridge subsequently signed a warrant for Bronshtein's execution. On December 3, 1997, a local publicly-funded capital defense group, the Center for Legal Education Advocacy and Defense Assistance (CLEADA), filed a motion for stay of execution on Bronshtein's behalf, as well

as a petition for collateral review pursuant to the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. C.S. § 9541 *et seq*. Several weeks later, on January 26, 1998, Bronshtein wrote to the trial court and disavowed the petition, which, he contended, had been filed without his permission. Bronshtein further requested that the PCRA petition be withdrawn, and that his execution proceed.

The trial court ordered a series of psychiatric evaluations, and held a number of evidentiary hearings and oral arguments over the next several months. During these proceedings, the court appointed new defense counsel to present Bronshtein's position that his PCRA petition was invalid and that he wanted to withdraw it. During the course of these hearings, the prosecution noted that the PCRA contained a statute of limitations, and that this deadline had passed. Transcript, 7/15/98, 20-21 (Third Circuit Appendix at 2039-40). The PCRA court eventually found that Bronshtein's request for withdrawal of his petition was knowing and voluntary. On January 26, 1999, the court allowed Bronshtein to withdraw his petition for state collateral review.

On February 25, 1999, CLEADA, now representing Bronshtein's mother and sister as putative "next friends," appealed the trial court's order allowing withdrawal. The Pennsylvania Supreme Court denied the appeal, finding that while these "next friends" had standing to pursue the action, they had failed to make a compelling showing that Bronshtein was incompetent and unable to make decisions for himself. Commonwealth v. Bronshtein, 729 A.2d 1102 (Pa. 1999).

After this latest state appeal was denied, CLEADA, once again representing Bronshtein's mother and sister, filed

a Petition for Writ of Habeas Corpus in the Eastern District of Pennsylvania. During a hearing on that petition, in which Bronshtein participated via telephone, Bronshtein informed the district court that he had changed his mind, and that he now wished to pursue collateral relief. Subsequently, on June 9, 1999, Bronshtein filed in state court a pleading entitled "Petition for Habeas Corpus Relief," which, as is required by state law, was re-characterized by the court as a second PCRA petition. The state trial court held that this petition was plainly untimely pursuant to the PCRA's one-year deadline, and the Pennsylvania Supreme Court once again affirmed. Commonwealth v. Bronshtein, 752 A.2d 868, 870-71 & n.3 (Pa. 2000), 152a-160a.

Bronshtein next returned to federal court. His habeas petition, prepared by newly appointed counsel, set out numerous issues and sub-issues that had not been included in Bronshtein's direct appeal. These claims were now defaulted by virtue of the state court's untimeliness ruling. The district court found, however, that there were *no* adequate procedural bars in this case, and that Bronshtein's claims were reviewable *de novo*. Bronshtein v. Horn, 2001 WL 767593 (E.D. Pa., July 5, 2001), 88a-151a. The court held that at the time Bronshtein missed the state deadline and inflicted "irreparable procedural damage" on his case, he was not "on notice" of the rule – that is, the state supreme court *could* have chosen to relax the deadline in capital cases. 98a n.9, 101a-114a & n.15-16. The district court also registered its "doubt" that any new rule could be adequate based on its clear language alone – that is, it must first be applied by judges. 104a n.12. This conclusion not only contradicts this Court's statement in Lee v. Kemna, 534 U.S. 362, 382 n.13 (2002), that "[t]he adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar," but would also impose a

period of "inadequacy" on every new procedural rule, no matter how plain or clearly worded.[1]

On the merits, the district court held that (1) the jury instructions improperly allowed the jury to convict Bronshtein of first-degree murder even if they believed "Mr. X" killed Alexander Gutman and that Bronshtein intended to participate only in a robbery; (2) the trial court should have instructed the jury at the penalty phase that a sentence of life imprisonment carried no possibility of parole; and (3) one of the aggravating factors found by the jury, that Bronshtein "committed a killing while in perpetration of a felony," was invalid because the jury *might* have believed Bronshtein was merely an accomplice to the crime, and not the shooter. The district court granted the writ and ordered a new trial, without reaching any of Bronshtein's many other claims arising out of his murder conviction and sentence. 116a-151a.

As to Bronshtein's convictions for robbery, theft, and conspiracy, the district court held that Bronshtein had not challenged them in his habeas petition. 151a n.35. Bronshtein took issue with this last finding and filed a Motion to Alter or Amend the Judgment, arguing that four of

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[1] The district court also held that every other possible procedural bar in Bronshtein's case – for example, his failure to make various timely objections at trial – was also inadequate. 114a-116a n.19. The court reached this conclusion for two reasons: (1) The possibility of "relaxed waiver" in death penalty cases apparently relieved capital defendants from compliance with any rule at all; and (2) The Pennsylvania Supreme Court was supposedly obligated to undertake a *sua sponte* independent review of capital cases for all possible "fundamental constitutional claims," which apparently meant that all constitutional claims were automatically exhausted in these cases. Id.

his claims did challenge these lesser convictions. The district court denied the motion, holding that three of the four claims did not implicate the remaining convictions; the district court denied the fourth claim on the merits. 75a-87a.

The Commonwealth appealed to the Third Circuit. Bronshtein cross-appealed the four "non-murder" claims, and sought a certificate of appealability for those issues. On April 14, 2005, the Third Circuit affirmed the district court's grant of relief with respect to sentencing, but reversed as to the guilt phase. The Court agreed with the district court that the state deadline for collateral review petitions was an inadequate rule. Because the state supreme court often relaxed some waiver rules in death penalty cases, the court reasoned, it might have relaxed the deadline, too, and that made the deadline inadequate. 11a-18a. The Court of Appeals thus reached the merits of Bronshtein's claims, and agreed with the district court that the trial court should have given a "life-means-life" instruction pursuant to Simmons v. South Carolina, 512 U.S. 154 (1994).[2] 30a-43a. The court affirmed that portion of the district court's order giving the state 180 days to re-sentence Bronshtein.

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[2] The Third Circuit rejected on the merits Bronshtein's challenge to the trial court's accomplice liability instructions, his claim that the prosecutor improperly exercised a peremptory challenge against a venireperson of Russian-Jewish extraction, and his challenge to the prosecutor's closing argument. The Court of Appeals rejected his remaining claims as defaulted (because they had been presented to the state courts only as issues of state law, rather than federal law), and alternatively denied them on the merits. The court below declined to reach the other claim upon which the district court had granted relief – the invalid aggravating circumstance claim – because the court had already directed that the writ be granted with respect to the penalty phase. 43a-74a.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to affirm that where a state prisoner has reasonable notice of a state procedural bar, and a fair opportunity to present his claims, the bar is adequate to support a procedural default.

This case raises important questions about what makes a state procedural ruling "inadequate" under habeas corpus jurisprudence. This is a critical issue, because a finding of "inadequacy" allows federal courts to overlook state procedural defaults, thus allowing these courts to hear and decide claims that state courts *could not* entertain under their own rules. This case is, therefore, about federalism: the power of states to set reasonable limits on collateral challenges to criminal convictions, the duty of prisoners to comply with these rules, and the obligation of federal courts to defer to them.

Since 1996, federal habeas courts have been required to defer to state court adjudications of *substantive* federal issues. That is the legacy of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Questions of adequacy and default implicate the flipside question: What deference is required to applications of state *procedural* bars? The court below concluded that state procedural bars that are not entirely predictable in application are entitled to no respect, and create no defaults, in federal habeas litigation. But this is not consistent with the structure of federal habeas corpus, or the basic principle that states have the power to make and enforce their own rules in their own criminal cases. After all, uncertainty is a common thing in litigation – lawyers make arguments *every day* about why a rule should or should not apply to particular facts, and the judge is called

upon to make a decision that conceivably could have gone the other way. But if the rule is clearly worded and fair, and if the litigants have notice of it, then the court's decision must stand, and federal habeas courts should not be able to ignore it.

As a practical matter, the stakes here are high. The Third Circuit's ruling is only the latest in a series of decisions which have now declared inadequate almost *all state procedural bars* applied to Pennsylvania capital cases that became final before 1998.[3] The result is *de novo* review of claims that were never properly presented to the state courts.

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[3] In addition to the opinion below, see Laird v. Horn, 414 F.3d 419, 2005 U.S. LEXIS 14547, *13 & n.7 (3d Cir. 2005) (PCRA waiver rule inadequate); Jacobs v. Horn, 395 F.3d 92, 117-18 (3d Cir. 2005) (trial waiver rule inadequate); Szuchon v. Lehman, 273 F.3d 299, 326-27 (3d Cir. 2001) (trial waiver rule); Jermyn v. Horn, 266 F.3d 257, 279 (3d Cir. 2001) (successive petition bar); Thomas v. Beard, No. 00-803, Slip Op. at 15-25 (E.D. Pa., August 19, 2005) (waiver, previous litigation bar, and PCRA time-bar); Baker v. Horn, 2005 U.S. Dist. LEXIS 16768, **88-90 (E.D. Pa. 2005) ("broad array of procedural rules" rendered inadequate by relaxed waiver); Rollins v. Horn, 2005 U.S. Dist. LEXIS 15493, *9-11 (E.D. Pa. 2005) (PCRA time-bar); Albrecht v. Horn, 314 F.Supp.2d 451, 458-60 (E.D. Pa. 2004) (waiver rule); Marshall v. Beard, 2004 U.S. Dist. LEXIS 17507, *11-12 (E.D. Pa. 2004) (waiver); Fahy v. Horn, 2003 U.S. Dist. LEXIS 14742, *85-88 (E.D. Pa. 2003) (time-bar); Pursell v. Horn, 187 F. Supp.2d 260, 292-97 (W.D. Pa. 2002) (waiver and time-bar); Yarris v. Horn, 230 F. Supp.2d 577, 584-86 (E.D. Pa. 2002) (time-bar); Wallace v. Price, 2002 U.S. Dist. LEXIS 19973, *34-41 (W.D. Pa. 2002) (Report and Recommendation) (bar against previously litigated claims), adopted, 265 F. Supp.2d 545 (W.D. Pa. 2003); Peterkin v. Horn, 176 F. Supp.2d 342, 354-55 (E.D. Pa. 2001) (waiver and time-bar).

In *every one* of these cases decided by the Third Circuit and/or the local district courts, relief has been granted. Several of these "inadequacy" decisions have been issued in just the past few weeks, and many more such cases are currently being litigated.

All of these Third Circuit rulings are based on one aspect of Pennsylvania death penalty jurisprudence – the Pennsylvania Supreme Court's now-abandoned discretionary practice of relaxing its rules of waiver in capital cases. In the opinion below, the court used the possibility of "relaxed waiver" to declare inadequate Pennsylvania's strict, one-year deadline for collateral review. In other cases, the Third Circuit (and local district courts) have used the same reasoning to declare other state rules "inadequate" in capital cases – state rules requiring contemporaneous objections, for example, or presentation of an issue on direct appeal, or the rule against re-litigation of previously decided claims. The Third Circuit does not meaningfully distinguish between various state rules – the court seems to assume that if the possibility of "relaxed waiver" made *some* rules uncertain in death penalty cases, then *all* of the rules must have been uncertain. Nor does the court below examine the particular facts of each default.

This one-size-fits-all approach is particularly disturbing in this case. "Relaxed waiver" never had anything to do with the state collateral review time limit. The state supreme court never "relaxed" the deadline in this case, or in any other case; it was *always* applied. Furthermore, Bronshtein himself was actually aware of the time-bar, and by the time he missed the deadline, it had been repeatedly applied by Pennsylvania courts in capital cases. Under the circumstances, the Third Circuit's refusal to recognize Bronshtein's default defeats all reasonable notions of

federalism. Furthermore, the Third Circuit's reasoning is not easily limited to capital cases, provided other petitioners can demonstrate that their claims were barred by application of an uncertain rule.[4]

Because Bronshtein failed to abide by state rules, the state courts could not decide the claim upon which the Third Circuit granted relief. If given a fair chance, the state courts almost certainly would have denied that claim – that the jury should have been told that a sentence of life imprisonment carried no possibility of parole.[5] Accordingly, the Third

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[4] Recently, the Third Circuit took up the question of whether Pennsylvania's post-conviction time limit is an inadequate procedural bar even in *non-capital* cases. That case is now awaiting oral argument. See Peterson v. Brennan, No. 04-2797 (3d Cir.).

[5] See Simmons v. South Carolina, 512 U.S. 154 (1994). The state supreme court would have rejected this claim, for several reasons: (1) the defense did not ask for such an instruction; (2) the jury did not request clarification on the availability of parole or the meaning of a life sentence; (3) at the time of Bronshtein's sentencing phase, Simmons had not yet even been decided, and counsel can hardly be blamed for failing to anticipate the change in law; and (4) the only way in which Bronshtein's future dangerousness was even *implied*, was through the prosecutor's cross-examination of the defense mental health expert during the sentencing phase. See Commonwealth v. Spotz, 759 A.2d 1280, 1289 (Pa. 2000) (defendant entitled to "life means life" instruction only where he requests it), cert. denied, 534 U.S. 1104 (2002); Commonwealth v. Fisher, 741 A.2d 1234, 1244-45 (Pa. 1999) (prosecution does not place defendant's future dangerousness at issue by discussing damaging psychological reports), cert. denied, 531 U.S. 829 (2000); Commonwealth v. Gibson, 688 A.2d 1152, 1169 (Pa.) (counsel not ineffective for failing to request Simmons instruction before Simmons was decided), cert. denied, 522 U.S. 948 (1997).

Circuit's review would have been limited to assessing whether the state court's decision was reasonable. As it is, Bronshtein is in a much better position, and was awarded wide-ranging *de novo* review, *precisely because* he violated a state procedural rule.

This Court should grant *certiorari* to restore clarity and balance to the jurisprudence of "adequacy," and to affirm that federal habeas courts should not ignore state procedural defaults.

I. Antuan Bronshtein had fair notice of Pennsylvania's one-year time limit for collateral review, and a reasonable opportunity to present his claims.

In 1995, Pennsylvania adopted a one-year time limit for state collateral review. This time-bar became effective in January of 1996. 42 Pa. C.S.A. § 9545(b). Since that time, the Pennsylvania Supreme Court and the state intermediate appellate court have applied the time limit strictly and uniformly, exactly as it was written. See, e.g., Commonwealth v. Peterkin, 722 A.2d 638, 643 (Pa. 1998); Commonwealth v. Cross, 726 A.2d 333, 608-14 (Pa. 1999); Commonwealth v. Yarris, 731 A.2d 581, 586-87 (Pa. 1999); Commonwealth v. Fahy, 737 A.2d 214, 217-24 (Pa. 1999); Commonwealth v Crawley, 739 A.2d 108, 109-110 (Pa. 1999); Commonwealth v. Gamboa-Taylor, 753 A.2d 780, 783-88 (Pa. 2000); Commonwealth v. Conway, 706 A.2d 1243, 1244 (Pa. Super. 1997); Commonwealth v. Alcorn, 703 A.2d 1054, 1056-57 (Pa. Super. 1997), appeal denied, 724 A.2d 348 (Pa. 1998). The Pennsylvania Supreme Court has never applied "relaxed waiver" to the deadline.

Bronshtein filed his late, second PCRA petition in 1999, more than one year after his judgment became final;

accordingly, the state courts held that this petition, which contained the Simmons claim upon which the federal courts later granted relief, was untimely. 155a-158a.

The PCRA time-bar closely parallels the AEDPA statute of limitations, which was enacted only a few weeks later. See 28 U.S.C. § 2244(d) (enacted April 24, 1996). Both statutes addressed chronic delays in collateral review by creating a one-year deadline, with limited exceptions for previously undiscoverable facts, or new and retroactive rules of law. Compare 28 U.S.C. § 2244(d)(1)(B)-(D) (exceptions to AEDPA time limit) with 42 Pa. C.S. § 9545(b)(1)(i)-(iii) (almost identical exceptions to PCRA deadline). The two statutes work closely together to preserve the possibility of exhaustion once the deadlines have passed – that is, under the PCRA time-bar, state courts are authorized to review the same new claims that will later qualify for an exception to the federal time limit.

In short, the PCRA time-bar advances the state's legitimate interest in preventing unnecessary delays, and it does so in the same, reasonable way used by the AEDPA itself.

This time limit was not unfairly sprung on Bronshtein. On January 16, 1996, when the PCRA time-bar became effective, Bronshtein was still litigating his direct appeal. Once this appeal was over, the time-bar had been in effect for more than a year; under its plain terms, Bronshtein could file a PCRA petition anytime before October 20, 1998. That is exactly what his counsel did. Bronshtein's first PCRA petition was filed on December 3, 1997; it was timely. 6a.

Bronshtein, however, decided in 1998 (while his PCRA petition was still pending) that he wanted to waive further review and withdraw the petition. The PCRA court took this matter very seriously, and only permitted Bronshtein to withdraw his petition after a long series of arguments and hearings, after which the court was satisfied that Bronshtein's decision was knowing and voluntary, and that he understood its significance. Finally, on January 26, 1999, the trial court allowed Bronshtein to withdraw his PCRA petition. 7a.

On that date, the consequences of Bronshtein's decision were clear, especially with respect to the PCRA time-bar. The deadline had been in effect for more than three years. It had been applied in capital and non-capital cases alike. Because Bronshtein's conviction had been final for well over a year, any subsequent petition would be untimely, and, therefore, once he withdrew his petition he could not file another one.[6] Bronshtein knew about the time-bar. *In fact, the prosecutor specifically described the deadline to Bronshtein during one of the hearings on withdrawal, and said that "I think we all agree that that time period has expired."* Transcript, 7/15/98, 21 (Third Circuit Appendix at 2040). A few moments earlier, **Bronshtein explicitly said he was aware of the time limit.** Id. at 20 ("I know that law") (Third Circuit Appendix at 2039). Bronshtein's counsel were also aware of the deadline. By the time

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[6] The PCRA contains no "tolling" provisions for earlier petitions – that is, Bronshtein could not claim that his one-year deadline had somehow been "tolled" between the date he filed his first PCRA petition, and the day he withdrew it. In this way, too, the PCRA deadline is identical to the AEDPA deadline. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (federal habeas deadline not tolled by earlier federal petition).

Bronshtein withdrew his petition, some of the lawyers who filed the PCRA petition on his behalf, and who tried to convince him not to withdraw it, had already litigated (and lost) several Pennsylvania death penalty petitions that had been dismissed as untimely under the 1996 PCRA amendments. See, e.g., Peterkin, 722 A.2d 638 (dismissed as untimely on December 21, 1998); Commonwealth v. Lark, 746 A.2d 585, 587 (Pa. 2000) (trial court dismissed Lark's second PCRA petition as untimely on June 9, 1998); Crawley, 739 A.2d at 108 (trial court dismissed Crawley's second PCRA petition as untimely on December 8, 1997); Fahy, 737 A.2d at 217 (trial court dismissed Fahy's fourth PCRA petition as untimely, among other grounds, on December 29, 1997).[7]

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[7] Another strong indication that the deadline was not a surprise to Bronshtein's attorneys, is that CLEADA – the death-penalty defense group who represented Bronshtein – and their other clients filed a number of state collateral petitions in the second week of January, 1997. This was just days before Pennsylvania's one-year "grace period" for older cases was set to expire on January 16. See, e.g., Jacobs, 395 F.3d at 117 (petition filed January 13, 1997); Baker, 2005 U.S. Dist. LEXIS 16768, *8 (January 15, 1997); Porter v. Horn, 276 F. Supp.2d 278, 290 & n.7 (E.D. Pa. 2003) (January 10, 1997); Yarris, 230 F. Supp.2d at 581 (January 10, 1997); Williams v. Vaughn, 3 F. Supp.2d 567, 570 (E.D. Pa. 1998) (January 9, 1997); Commonwealth v. Tedford, 781 A.2d 1167, 1170 (Pa. 2001) (January 15, 1997); Commonwealth v. Beasley, 741 A.2d 1258, 1262 (Pa. 1999) (January 16, 1997); Peterkin, 722 A.2d at 639 (January 13, 1997). Many of these petitions were untimely anyway, because the statute provided a grace period only for *first* petitions, not for *successive* petitions. But the point is, these lawyers knew about the deadline, and tried their best to meet it – many months before they even filed Bronshtein's first state collateral petition, let alone before Bronshtein demanded that it be withdrawn.

It would be one thing if Bronshtein were claiming that his decision to withdraw his PCRA petition was involuntary or coerced. At least that would be arguable (although unconvincing, because Bronshtein clearly knew what he was doing.) But tha. is not even the issue – Bronshtein is claiming, and the Third Circuit has agreed, that the PCRA time limit itself was so *unfair* as to be due zero deference in federal court. It is hard to fathom how this could be; even apart from the clear wording of the statute, any possibility of unfair surprise is utterly refuted by the record.

Because Bronshtein was fully aware of the PCRA deadline when he decided to waive further review, any common sense approach to procedural default would prevent him from litigating these late claims in federal court (at least, not without a showing of cause and prejudice).

II. The Third Circuit misapplied the "adequacy" test; the PCRA time-bar is an adequate procedural bar in this case, because Bronshtein had ample notice of it, and he had several opportunities to properly present his claims to the state courts.

When state courts reject a federal claim, federal habeas courts will not entertain it so long as the state court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." Lee, 534 U.S. at 375, quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991). The Pennsylvania Supreme Court held in 1999 that Bronshtein's second PCRA petition was untimely under § 9545(b) of the state collateral review statute. 155a-158a. There is no question that this holding was "independent" of federal law; the only issue here is the "adequacy" of the rule.

The ultimate purpose of the "adequacy" test in the habeas context is to ensure that states do not set traps for unwary prisoners as they attempt to assert federal claims. For example, if a state appellate court invents a contemporaneous objection rule that did not exist at the time of trial, or concocts a new technical pleading requirement long after the prisoner could possibly comply with it, the prisoner has been unfairly deprived of his opportunity to raise the federal claim. The result is that the state courts have prevented the assertion of the federal right by the unfair manipulation of state procedure.

This Court has used a variety of different formulations to describe what makes a rule inadequate: there is the "arid ritual" test, the "no legitimate state interest" test, the "unnecessary burden" test, the "uncertainty in application" test, the "not firmly established or regularly applied" test, and the "novel requirements" test, among others.[8] These different formulations have proven useful in different factual contexts, but taken together they can be confusing. Sometimes these various tests seem to lead in different directions in a particular case. Ultimately, however, all of these tests resolve into a basic principle: a state rule is "adequate" if (1) the prisoner has fair notice of it, (2) the rule serves a legitimate state interest, and (3) the prisoner has a

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[8] See, e.g., James v. Kentucky, 466 U.S. 341, 348-51 (1984) ("firmly established and regularly followed" test); Henry v. Mississippi, 379 U.S. 443, 447 (1965) ("legitimate state interest" test); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958) ("novelty" test); Staub v. City of Baxley, 355 U.S. 313, 320 (1958) ("arid ritual of meaningless form" test); Brown v. Western R. Co. of Alabama, 338 U.S. 294, 298 (1949) ("unnecessary burden" test).

reasonable opportunity to raise his federal claims. See generally C. Wright, A. Miller & E. Cooper, 16B Federal Practice and Procedure § 4027 (2d ed. 1996) (endorsing functional approach to adequacy analysis: "[t]he most workable of all the general tests is found in the requirement that state courts afford a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way").

The "reasonable opportunity" test gets to the heart of the issue, which is ultimately whether the state process has been fair to the petitioner. It gives appropriate deference to the state's power to set and enforce its own rules in criminal cases, while ensuring that the petitioner's diligent attempts to assert his federal rights, and his reasonable reliance on the state's previous application of its rules, are not defeated by arbitrary or discriminatory "local practice." See Davis v. Wechsler, 263 U.S. 22, 24 (1923) (Holmes, J.). This Court has time and again relied on this principle. See Michel v. Louisiana, 350 U.S. 91, 93-95 (1955) (federal courts will not disturb state procedural bar if defendant had "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court"), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948). See also Smith v. Robbins, 528 U.S. 259 (2000) (adequate state review procedures are those that "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal") (quotation omitted); Ford v. Georgia 498 U.S. 411, 423 (1991) (ultimate adequacy question is whether petitioner could fairly be deemed to have been apprised of the rule's existence when he still could have tailored his litigation to comply with it); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958) (new procedural requirements are inadequate where petitioner has acted "in justified reliance on

prior decisions" and could not "fairly be deemed to have been apprised of [the new rule's] existence").

The application of these principles is not difficult in this case. Bronshtein had notice of the PCRA time-bar when he withdrew his petition. It had been in place for about three years; it was plainly worded; Bronshtein even stated in court that he was aware of the time limit before he withdrew the petition. Just as plainly, the PCRA deadline serves a legitimate state interest, like its federal counterpart, the AEDPA time limit. Finally, Bronshtein had a reasonable opportunity to raise his claims. The claim upon which the Third Circuit granted relief – the Simmons claim – is a claim that the trial court's sentencing instructions were improper. Bronshtein could have raised this claim at his sentencing, but did not; he could have raised it (or a claim that his trial counsel was ineffective for failing to raise a Simmons objection) on direct appeal, but did not; he could have raised a variant of the claim in his timely PCRA petition, but did not. Even after all of that, he could have amended his PCRA petition, and added a Simmons/ineffectiveness claim, while the petition was pending.[9] Instead, he withdrew the petition. The default was not the product of an unfair application of the time-bar; it was the result of a completely predictable application of the deadline, and his own failure to raise the claim earlier.

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[9] The PCRA freely allows such amendments with the consent of the trial judge. Pa. R. Crim. P. 905(A).

A. The Pennsylvania Supreme Court's discretionary practice of relaxing its waiver rules in death penalty cases did not render the PCRA time-limit inadequate.

The Third Circuit converted the "adequacy" analysis into a mechanical, two-step process that had nothing to do with fairness at all, let alone the actual facts of the case. First, the court fixed the "date of default" on October 20, 1998, even though Bronshtein was in the middle of litigating his timely state collateral petition on that date, and had not yet missed any deadline. Second, the court held that the time limit was not "firmly established" as of that date because the Pennsylvania Supreme Court *might* have refused to apply it in capital cases. 12a-17a. This is an improper test that does not give sufficient deference to state procedural rulings.

The source of the supposed uncertainty was the state supreme court's former practice of relaxing its rules of waiver in capital appeals. As the Pennsylvania Supreme Court explained in Commonwealth v. Freeman, 827 A.2d 385, 393-403 (Pa. 2003), cert. denied, 125 S. Ct. 30 (2004), this "relaxed waiver" was a discretionary tool by which the Court could choose to review the merits of otherwise waived claims. It originated soon after the enactment of Pennsylvania's post-Furman[10] death penalty law, to address the concern that a prisoner might be executed before he had any collateral review at all. Freeman, 827 A.2d at 399. This fear turned out to be groundless; in Pennsylvania, all death-sentenced prisoners have had the opportunity to seek relief under the PCRA after completion of their direct appeal. Id. In 1998, the state supreme court announced that the doctrine had outlived its usefulness on collateral review, and would no longer be applied in appeals from the denial of PCRA relief.

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[10] Furman v. Georgia, 408 U.S 238 (1972).

Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998). In 2003, the Court abandoned the practice altogether, even on direct appeal. Freeman, 827 A.2d at 402.

It is important, however, to note that there were limitations to the practice, even before it was abandoned. First, "relaxed waiver" was a matter of discretion, and it was not always applied. Beard v. Banks, 124 S. Ct. 2504, 2510 (2004), citing Freeman, 827 A.2d at 400 n.9. Second, it was not appropriate for strategic use by death-sentenced prisoners. See Commonwealth v. O'Donnell, 740 A.2d 198, 204 (Pa. 1999) ("[the] relaxed waiver doctrine ... was never meant to serve as an invitation to appellate counsel to appear before this Court *carte blanche* and expect that we will resolve a litany of newly developed challenges not raised or objected to before the lower court"); Commonwealth v. Gibson, 688 A.2d 1152, 1161 n.15 (Pa. 1997) ("That a matter is a death penalty case in no way relieves trial counsel of the duty to raise appropriate contemporaneous objections at trial to allow the trial court to cure any alleged error as well as preserve issues for appellate review"), cert. denied, 522 U.S. 948 (1997); Commonwealth v. Williams, 660 A.2d 1316, 1320 (Pa. 1995) (same), cert. denied, 516 U.S. 1051 (1996). Thus, if a death-sentenced prisoner withheld claims or objections based on the possibility that the rules of waiver would not be applied against him, that was an abuse of the Court's practice.

Finally "relaxed waiver" did not apply equally to all rules at all times. In particular, "relaxed waiver" had *nothing* to do with the PCRA time-bar, and was never used to forgive a late PCRA filing. In fact, the PCRA time limit is jurisdictional; the state courts have no power to "relax" it in a capital case, or any other case. Commonwealth v. Banks, 726 A.2d 374, 376 (Pa. 1999). This is a matter of state

constitutional law. The Pennsylvania General Assembly has the power to set the jurisdiction of the courts, and once it has done so, the courts cannot exercise power beyond these boundaries. Commonwealth v. Fahy, 737 A.2d 214, 222-23 (Pa. 1999).

Bronshtein argued below, however (and the Third Circuit agreed) that Pennsylvania capital prisoners were not *sure* that the time bar would be applied to them until the Supreme Court *actually invoked it* in a death penalty case, and maybe not even then. 15a-16a. But this is not the kind of "uncertainty" that creates unfair results, or that renders a state procedural bar inadequate. Rather, there is always some room for doubt about the application of new rules to particular facts. That does not mean that these rules are "inadequate." See Lee, 534 U.S. at 382 n.13 ("[t]he adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar"). When a new rule is plainly worded, litigants are not free to ignore it simply because they are able to imagine some favorable (but incorrect) legal theory which exempts them from compliance.

In fact, there was less room for doubt about the PCRA time-bar than most new rules. First of all, the time limit spoke in plain terms, and contained several clear exceptions – suggesting that there were no *other* exceptions. Second, the time limit was included in a portion of the PCRA statute entitled "Jurisdiction and Proceeedings" – suggesting it was jurisdictional and not subject to "relaxation." Finally, the 1996 PCRA amendments, which included the time-bar and a number of other provisions, *explicitly applied* to capital cases. Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1) ("Except as specifically provided otherwise, *all provisions of this subchapter shall apply to capital and non-*

capital cases") (emphasis added), 1995 Purdon's Legislative Service 580 (Purdon).

Not surprisingly, the state courts applied the new time limit strictly from the very beginning. The Pennsylvania intermediate appellate court applied it at the first opportunity, in 1997. See Alcorn, 703 A.2d at 1056-57. The Pennsylvania Supreme Court applied it to a death penalty case, also at the very first opportunity, in 1998. See Peterkin, 722 A.2d at 643.[11] Thus, whatever uncertainty there may have been about the rule's application, it had vanished by the time Bronshtein was allowed to withdraw his first petition.

In order to avoid this state law, the court below pushed Bronshtein's "date of default" forward by many months through the use of a legal fiction. According to the Third Circuit, Bronshtein's "date of default" occurred on October 20, 1998, exactly one year after his judgment became final, despite the fact that he was then in the middle of litigating his first timely PCRA petition. 16a. Thus, the lower court did not have to account for the Pennsylvania Supreme Court's decisions applying the time limit in death penalty cases – let alone the fact that Bronshtein's prosecutor actually stated, in court and with Bronshtein present, that the time bar applied to him. But this "date of default" analysis defies common sense. Bronshtein did not give up any rights on that day; he could still have raised any claims he wanted. Only later, when Bronshtein actually withdrew his petition, was the PCRA time limit triggered to prevent him from raising any further claims. The day he was allowed to

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[11] In Pennsylvania, the state supreme court, rather than the intermediate Superior Court, automatically hears all appeals in death penalty cases. 42 Pa. C.S.A. § 9711(h).

withdraw his petition – with one last chance to change his mind – was the day that mattered.

The more fundamental point is, Bronshtein and every other capital litigant in Pennsylvania had strong reason to believe that the time-bar posed a potential problem, and should have litigated cautiously to comply with it.[12] In this case, the record shows that Bronshtein knew about the time limit, so either he did not care about it, or he secretly thought he could ignore it and later litigate another state collateral petition under "relaxed waiver." Even under the old "deliberate bypass" standard – which this Court ultimately rejected many years ago as too forgiving of state procedural violations – this amounts to "deliberate bypass," which would have led to a clear default. See Murch v. Mottram, 409 U.S. 41, 45 (1972) (where prisoner deliberately withholds a claim from petition for collateral review, "in the hope of being granted two hearings rather than one or for some other such reason," withheld ground is procedurally defaulted), quoting Sanders v. United States, 373 U.S. 1, 18 (1963). Either way, the "uncertainty" of the PCRA time limit is a fiction that had nothing to do with Bronshtein's state court litigation, and it did not create an "inadequate" procedural default.

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[12] The Third Circuit went so far as to say that Bronshtein "did not have fair notice" of the PCRA time-bar at the time of his default. 16a. Putting aside the proof that Bronshtein and his lawyers actually knew about the time bar, and even assuming that the default occurred in 1998 rather than 1999, how could a prisoner have "no fair notice" of a statute that means exactly what it says?

III. The various Circuits disagree on the proper way to analyze the adequacy of state procedural rules.

The Third Circuit's opinion below has deepened a split in the Circuits about the "adequacy" of similar state procedural rules, and the proper way to analyze the "adequacy" issue generally. For example, in Barrientes v. Johnson, 221 F.3d 741, 758-61 (5th Cir. 2000), cert. dismissed, 531 U.S. 1134 (2001), the Fifth Circuit held adequate a default based on a Texas "abuse of the writ" rule that was not strictly applied until 1994. Before then, the Texas state courts often heard claims raised in successive collateral review petitions that should have been barred as waived under the plain language of the relevant Texas statute. Barrientes' conviction became final in 1988, and his first state post-conviction petition was denied in 1989, when the "abuse of the writ" rule was still often overlooked. In 1997, however, the state court dismissed Barrientes' second state collateral petition as improperly successive.

The Fifth Circuit's analysis differs from the Third Circuit's reasoning in several important respects. First, the Fifth Circuit held that the "date of default" was not 1988 or 1989, as Barrientes urged, when his first state collateral petition was filed or dismissed. Instead, the court held that the relevant "date of default" occurred in 1997, when the state court "dismissed, or would dismiss, the claims at issue as an abuse of the writ." Id. at 760. This "date of default" analysis is the opposite of Third Circuit's; its application in Bronshtein's case (and in many other Pennsylvania death penalty cases) would have led to a different result.

The Fifth Circuit also emphasized that Barrientes (and other Texas prisoners) had fair notice of the "abuse of the writ" rule, even before it was strictly applied. The statute

was clear, and Texas courts could choose to apply it at any time. 221 F.3d at 760 n.12. If Texas prisoners chose to ignore the rule, or if they planned on filing successive petitions, they did so at their own risk. Thus, the mere existence of some "uncertainty" about the rule's application was not enough to make it inadequate to support a default. Once again, this analysis is completely contrary to that of the Third Circuit, and it would have led to a different outcome in this case.

In Luberda v. Trippett, 211 F.3d 1004, 1006-1008 (6th Cir. 2000), the Sixth Circuit took the same approach as did the Fifth. The court held that the adequacy of a state procedural ruling must be determined via a fact-specific, case-by-case analysis of whether the petitioner had fair notice of the state rule, and whether he had a reasonable opportunity to raise the claims in question. Id. at 1008. The Sixth Circuit found that Michigan's new, strict waiver rule, requiring that *all* claims be raised on direct appeal – enacted while Luberda's direct appeal was pending – was adequate to bar his claims on state collateral review. Id. This "fair notice/reasonable opportunity" test, which requires a more nuanced analysis than the Third Circuit's "uncertainty" inquiry, would have led to a different outcome for Bronshtein.

So far this year, two more Circuits have issued opinions that reject an unadorned "uncertainty" analysis in favor of a balanced, functional approach – and in the process, these courts would have reached a different result here. The Seventh Circuit, in Miranda v. Leibach, 394 F.3d 984, 991-97 (7th Cir. 2005), cert. denied, 125 S. Ct. 2947 (2005), held that the inconsistent application of the Illinois waiver rule, which bars claims that were not preserved in post-trial motions, did not render that rule inadequate. The court

noted, first, that the application of the bar was not "aberrant" or "freakish," because the rule was relatively clear and *was* invoked in some cases. There may have been some uncertainty, but that was not enough. In any event, the court emphasized that Miranda had been aware of the rule, had acknowledged it in his briefs, and had asked the Illinois courts to hear his claims anyway. Id. at 996-97. Bronshtein, too, was aware of the Pennsylvania time limit for collateral review. Under the Seventh Circuit's analysis, then, Bronshtein's Simmons claim would have been defaulted.

Finally, in Hurth v. Mitchem, 400 F.3d 857, 860-64 (11th Cir. 2005), the Eleventh Circuit addressed some conflicting holdings in its own decisions, and held that a state time limit on collateral review can be adequate even before the state supreme court characterizes the deadline as jurisdictional. This stands in sharp contrast with the court below, which described the Pennsylvania collateral review deadline as uncertain – and therefore inadequate – at least until the Pennsylvania Supreme Court explicitly applied it in a death penalty case, and perhaps until the state supreme court specifically desribed it as jurisdictional. 16a.

At the other end of the spectrum – that is, willing to declare state rules inadequate if they might not apply to a particular case – stands the Third Circuit, and the Ninth Circuit.[13] In the last decade, the Ninth Circuit has declared

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[13] The Tenth Circuit is somewhere in the middle. In Walker v. Attorney General, 167 F.3d 1339, 1344-45 (10th Cir.), cert. denied, 528 U.S. 987 (1999), that Circuit held inadequate a state waiver rule that barred prisoners from raising new claims in post-conviction petitions. The court found that this rule did not leave sufficient room for prisoners to bring new claims based on new law. Subsequently, in Cargle v. Mullin, 317 F.3d 1196, 1201 (10th

(continued...)

"inadequate" several state post-conviction rules, each time using the same strict two-step analysis: First, the federal court sets the "date of default" as early as possible, usually at the time the prisoner could have raised his claims, but did not; and second, if the procedural bar that was eventually used to bar the prisoner's claims was uncertain at that date, then it was inadequate to support a procedural default in federal court. See, e.g., Valerio v. Crawford, 306 F.3d 742, 776-79 (9th Cir. 2002) (*en banc*) (Nevada waiver rule inadequate in capital case, where state supreme court often relaxed rules in death penalty cases), cert. denied, 538 U.S. 994 (2003); Fields v. Calderon, 125 F.3d 757, 761-65 (9th Cir. 1997) (no default where California PCR rules had become "inconsistent"), cert. denied, 523 U.S. 1132 (1998).

In Collier v. Bayer, 408 F.3d 1279, 1283-86 (9th Cir., June 3, 2005), the Ninth Circuit ruled inadequate another Nevada post-conviction procedural ruling – the state collateral review time limit. The Ninth Circuit held, just like the Third Circuit, that the petitioner need not even show that the rule has *ever* been inconsistently applied, so long as he can demonstrate that its application to the facts of his own case was somehow uncertain – in other words, the rule is inadequate if the petitioner can think of a reason why the rule should not apply to him. Id. at 1284 n.5. Judge Bea wrote a vigorous dissent, in which he argued that the majority

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Cir. 2003), the court clarified that the state waiver rule was not inadequate when applied on new claims based on *old* law – claims that the prisoner could have raised earlier, but did not. Application of the Tenth Circuit's rule in this case would, once again, have led to a different result, because this Court decided Simmons in 1994, and Bronshtein certainly could have raised a claim based on that decision in his first, timely, state petition for collateral review, filed in 1997.

opinion allows Nevada prisoners to "mock" the state deadline:

> ... [T]he majority presumes that a statute is not well-established unless a court has ruled that the statute means what it says. This ruling will lead to all sorts of mischief. Habeas petitioners have a duty to follow the plain language of a State's procedural rules, even where no State court has yet rejected the precise attempt made by the petitioner to circumvent those rules. ...

Id. at 1289 (Bea, J., dissenting) (citation omitted).[14]

The contours of the adequacy rule are important, in Pennsylvania and across the country, in death penalty cases and where lesser sentences were imposed. Because a finding of inadequacy is a powerful means for evading state procedure, and because the various Circuits are at odds with one another, this Court should grant certiorari and clarify the contours of "adequacy" analysis.

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[14] It is no surprise that state judges have expressed their frustration with the apparent eagerness of some federal courts to declare state rules inadequate. See, e.g., In re Gallego, 18 Cal. 4th 825, 851 (1998) (Brown, J., concurring and dissenting) ("We are no closer to the ever-receding dream of adequate state grounds and farther from the goals of finality and comity. ... In my view, it is time to recognize our procedural bars do not preclude federal court merit review and probably never will").

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 14, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 01-9004 & 01-9005

ANTUAN BRONSHTEIN,

v.

MARTIN L. HORN, Commissioner, Pennsylvania Department of Corrections,

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS;* JAMES PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW;** GERALD J. PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA,

Appellants, No. 01-9004,

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* (Pursuant to Rule 12(a), F.R.A.P.)

** (Amended in accordance with Clerk's Order dated 6/23/04)

Appendix A

ANTUAN BRONSHTEIN,

Appellant, No. 01-9005,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections;* JAMES PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW;** GERALD J. PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. NO. 99-CV-02186)
District Judge: The Honorable Lowell A. Reed, Jr.

Argued: April 22, 2003

Before: ALITO, BARRY, and STAPLETON, *Circuit Judges*.

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* (Amended in accordance with Clerk's Order dated 8/29/01.)

** (Amended in accordance with Clerk's Order dated 6/23/04.)

Appendix A

OPINION OF THE COURT

ALITO, *Circuit Judge*:

Antuan Bronshtein was convicted in a Pennsylvania court for first-degree murder and sentenced to death. After unsuccessful post-trial litigation in the state courts, he filed the habeas petition now at issue. The District Court found merit in some but not all of Bronshtein's claims and ordered that a writ of habeas corpus be granted unless Bronshtein was retried within a specified time. The habeas respondent (hereinafter "the Commonwealth") appealed, and Bronshtein cross-appealed. We reverse the order of the District Court insofar as it required a new guilt-phase trial, but we affirm insofar as it required resentencing.

I.

In April 1994, Antuan Bronshtein was tried in the Court of Common Pleas of Montgomery County on charges stemming from the robbery and shooting death of Alexander Gutman. The evidence at trial may be summarized follows. At about 5 p.m. on January 11, 1991, Montgomery County police investigated a robbery at a store called Jewelry by Alex in the Valley Forge Shopping Center. *See Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907, 911 (1997), *cert. denied*, 522 U.S. 936, 118 S.Ct. 346, 139 L.Ed.2d 269 (1997). The police discovered that the proprietor, Alexander Gutman, had been killed by two gunshot wounds to the face. *Id.* Investigators found three fingerprints and a palmprint on one of the intact display cases in the store, and these prints were later identified as Bronshtein's. *Id.*

Appendix A

On February 27, 1991, Bronshtein contacted Philadelphia police investigators and said that he wanted to discuss the murder of another jeweler, Jerome Slobotkin, who had been killed in Philadelphia on February 19, 1991. *Bronshtein*, 691 A.2d at 912. After waiving his *Miranda* rights, Bronshtein signed a detailed written confession admitting to the Slobotkin murder, and in February 1992, he was convicted for that offense. *Id.*

About a month after Bronshtein confessed to the Slobotkin murder, Montgomery County police met with Bronshtein, at his request, to discuss the Gutman murder. During this interview, Bronshtein denied killing Slobotkin and said that both Slobotkin and Gutman had been killed by a "Mr. X," whom Bronshtein described as a high-level member of the "Russian mafia." *Id.* During this interview, Bronshtein did not disclose Mr. X's name, but he later identified him as Adik Karlitsky, another jeweler. *Id.*

Although Bronshtein told the Montgomery County police that he had not killed Gutman, Bronshtein admitted that he was acquainted with him and that he knew that he owned a jewelry store. *Bronshtein*, 691 A.2d at 912. However, Bronshtein denied knowing the location of the store or even that of the Valley Forge Shopping Center, and he claimed that he had not seen Gutman in more than two years. *Id.*

At trial, however, three witnesses identified Bronshtein as a man whom they had seen in or near Gutman's store on the day of his murder. Laura Sechrist stated that she had passed the store at approximately noon and had seen Bronshtein and another man talking to Gutman. *Bronshtein*,

691 A.2d at 912. Larry Bainbridge, a postal carrier, testified that he had walked by the store at 12:45 p.m. and had seen Bronshtein behind the counter. *Id.* Alexander Daniels testified that he had passed the store at about 3:15 p.m. and had seen Bronshtein standing outside the store. *Id.*

Finally, a man named Wilson Perez testified about an admission made by Bronshtein during January 1991. According to Perez, he and Bronshtein were riding in Bronshtein's car on Roosevelt Boulevard in Philadelphia when Bronshtein said that he had killed a man in a jewelry store "out past the boulevard" and had taken his jewelry. *Bronshtein*, 691 A.2d at 912. As the Pennsylvania Supreme Court noted, Roosevelt Boulevard "runs in a northerly and southerly direction through Northeast Philadelphia," and "[i]n order to travel to Montgomery County from a large section of Northeast Philadelphia, it is necessary to cross ... Roosevelt Boulevard." *Id.* at 912 n. 12. Perez further testified that Bronshtein had given unset gemstones to Perez's brother. *Id.* at 912.

The Commonwealth proceeded on the theory that, although a second person had probably been involved in the robbery of Gutman's store, it was Bronshtein who intentionally shot and killed Gutman. Bronshtein, on the other hand, contended that Adik Karlitsky shot and killed Gutman. According to Bronshtein, Karlitsky was a high-level member of a Russian organized crime group. Bronshtein said that he worked for Karlitsky as a jewelry "fence" and had merely accompanied Karlitsky to Gutman's store without knowing that Karlitsky was going to kill him.

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The jury convicted Bronshtein of first-degree murder, robbery, theft of movable property, and possession of an instrument of crime, as well as conspiracy to commit murder, robbery, and theft. At the penalty phase, the jury found two aggravating circumstances: that Bronshtein had "committed [the] killing while in the perpetration of a felony," 42 Pa. Cons.Stat. § 9711(d)(6), and that he had "a significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. Cons.Stat. § 9711(d)(9). The jury found three mitigating circumstances: extreme mental or emotional disturbance, poor childhood upbringing, and "a possibility that the defendant did not pull the trigger." App. VI at 1969; *see* 42 Pa. Cons.Stat. § 9711(e)(2), (8). However, the jury found that the aggravating circumstances outweighed the mitigating circumstances and accordingly returned a sentence of death for the first-degree murder conviction. The trial court subsequently imposed the death sentence along with consecutive terms of imprisonment for the other convictions. The Pennsylvania Supreme Court affirmed, *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907 (1997), and the United States Supreme Court denied certiorari on October 20, 1997. 522 U.S. 936, 118 S.Ct. 346, 139 L.Ed.2d 269 (1997).

On December 3, 1997, the Center for Legal Education, Advocacy and Defense Assistance ("CLEADA") filed a "*pro se*" Post-Conviction Relief Act ("PCRA") petition on Bronshtein's behalf ("*pro se* PCRA petition"). The petition did not state any claim for relief; it merely stated: "This is not a counseled PCRA petition, but a request to initiate review, filed pro se. A counseled petition shall be filed later pursuant to the court's order." App. VII at 2126. The petition

was signed by a CLEADA attorney, purportedly with Bronshtein's authorization.

Shortly after the "*pro se*" PCRA petition was filed, Bronshtein personally informed the trial court "that he wished to waive his right to appeal and to terminate the PCRA proceedings so that the sentence of death could be carried out immediately." *Id.* at 2121. He later told the court that the CLEADA attorneys "had been misleading him and acting contrary to his instructions[.]" *Id.* at 2121 n. 2. On January 26, 1999, after extensive litigation over Bronshtein's competency to waive his rights under the PCRA, the trial court issued an order dismissing the "pro se" PCRA petition with prejudice. The court found that Bronshtein had "knowingly, intelligently and voluntarily" sought to withdraw the petition. *Id.* at 2125.

Bronshtein's mother and sister filed a next friend appeal from the trial court's order. On April 16, 1999, the appeal was denied by the Pennsylvania Supreme Court, which held that the appellants had failed to show that Bronshtein was incompetent. *Commonwealth v. Bronshtein,* 556 Pa. 545, 729 A.2d 1102 (1999). On April 23, 1999, Bronshtein's mother and sister filed a petition for a writ of habeas corpus in the District Court and asked the Court to issue a stay of execution. On April 29, 1999, during a hearing on the petition, Bronshtein informed the District Court that he had changed his mind and wished to pursue post-conviction relief. The District Court stayed Bronshtein's execution, appointed counsel for him, and gave him 120 days to prepare and file his own federal habeas petition.

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On June 9, 1999, Bronshtein filed with the state trial court a petition styled as an "Amended Petition For Habeas Corpus Relief Under Article I, Section 14 Of The Pennsylvania Constitution And For Statutory Post Conviction Relief Under The Post Conviction Relief Act." The trial court treated the petition as a second PCRA petition and dismissed it for lack of jurisdiction, holding both that Bronshtein had "irrevocably waived" his right to seek post-conviction relief and that the petition was untimely. App. VII at 2111-13. The Pennsylvania Supreme Court affirmed, stating that it "agree[d] with the PCRA court that [Bronshtein's] petition [was] untimely, leaving [it] without jurisdiction to reach [Bronshtein's] issues." *Commonwealth v. Bronshtein*, 561 Pa. 611, 752 A.2d 868, 871 (2000). The Pennsylvania Supreme Court found that Bronshtein's "judgment became final on October 20, 1997, the date that the United States Supreme Court denied certiorari." *Id.* at 870. The state supreme court therefore reasoned that Bronshtein "was required to file his petition for post-conviction relief within one year of October 20, 1997, that is by October 20, 1998, in order for his PCRA petition to be timely filed." *Id.* The Pennsylvania Supreme Court did not address the question whether Bronshtein had "irrevocably waived" his right to seek post-conviction relief, as the trial court had held.

Bronshtein filed the present petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 27, 1999. The petition asserted 15 claims, but only seven are at issue in this appeal. The following claims (numbered as they were in the petition) are before us:

I. The trial court violated due process by erroneously instructing the jury that

Bronshtein's specific intent could be inferred from the actions of his co-conspirator.

III. Bronshtein's death sentence violates the Eighth Amendment because it was based in part on an aggravating circumstance (42 Pa. Cons.Stat. Ann. § 9711(d)(6)) that the jury did not find beyond a reasonable doubt.

IV. The trial court violated Bronshtein's federal constitutional rights by excluding material and relevant defense evidence.

V. The trial court's admission of "other crimes" evidence violated Bronshtein's federal constitutional rights.

VI. Bronshtein's due process rights were violated by repeated acts of prosecutorial misconduct.

VII. The prosecution violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by exercising a peremptory strike against a potential juror of Russian-Jewish heritage.

IX. The trial court violated the Eighth Amendment by failing to inform the jury that a life sentence in Pennsylvania means life without the possibility of parole.

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The District Court handed down a decision without holding an evidentiary hearing. *See Bronshtein v. Horn*, 2001 WL 767593, 2001 U.S. Dist. LEXIS 9310 (E.D.Pa. July 5, 2001). Before reaching the merits of Bronshtein's claims, the District Court first addressed the issue of procedural default. Although some of Bronshtein's claims had been raised in the state courts for the first time in the second PCRA petition, which the state supreme court had found to be untimely, the District Court held that these claims were not procedurally defaulted, "because the procedural rule that the Supreme Court of Pennsylvania relied upon in rejecting his claims was not clearly established or regularly followed at the time of his alleged default, [and] therefore was not sufficiently 'adequate' to bar federal habeas review." App. I at 3, 7-21. Turning to the merits, the District Court concluded that the trial court's instructions on co-conspirator liability had violated Bronshtein's due process rights by permitting the jury to convict Bronshtein of first-degree murder without finding that he had the specific intent to kill, and the District Court found that this error was not harmless. *See id.* at 25-34. The District Court next concluded that the trial court had violated *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), by failing to inform the jury that a Pennsylvania prisoner sentenced to life imprisonment may not be paroled. *See id.* at 35-41. Finally, the Court concluded that Bronshtein's death sentence violated the Eighth Amendment because it was based in part on an invalid aggravating circumstance (42 Pa. Cons.Stat. § 9711(d)(6) (commission of the killing while in the perpetration of a felony)).

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The Court ordered that a writ of habeas corpus be issued if the Commonwealth did not retry Bronshtein within 180 days, and in light of this relief, the Court found it unnecessary to address the other claims raised in the petition. *See* App. I at 46 n.33. The Court stated that Bronshtein had not argued "that his convictions for robbery, theft, and conspiracy were constitutionally flawed," and the Court therefore did "not consider those convictions[.]" *Id.* at 47 n. 35.

Bronshtein filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). He argued that his § 2254 petition did in fact raise claims—specifically, Claims IV, V, VI and VII—challenging his robbery, theft, and conspiracy convictions. The District Court denied the motion and held that the "voluminous and carefully crafted submissions on [Claims IV, V and VI] can only be read to challenge the murder conviction." *Bronshtein v. Horn,* 2001 WL 936702 (E.D.Pa. Aug.16, 2001). However, the Court agreed with Bronshtein that Claim VII addressed the other convictions, but the Court rejected that claim on the merits. *Id.*

The Commonwealth has appealed the District Court's order granting relief on Claims I, III, and IX. Bronshtein has filed a cross-appeal, and he requests a certificate of appealability on Claims IV, V, VI and VII. His request was referred to this panel and is now before us along with the Commonwealth's appeal.

II.

We first consider the claims (i.e., Claims I, III, and IX) on which the District Court granted relief. All of these claims

were raised for the first time in the state courts in the second PCRA petition and, as noted, the Pennsylvania Supreme Court affirmed the dismissal of that petition on the ground that it was untimely. The Commonwealth therefore contends that federal habeas review of the merits of these claims is blocked by the doctrine of procedural default.

The procedural default doctrine precludes a federal habeas court from "review[ing] a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (emphasis added). The United States Supreme Court has employed a variety of tests to determine whether a state ground is "adequate." Among other things, state procedural rules have been held to be inadequate if they are not "firmly established and regularly followed," *Ford v. Georgia,* 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (quoting *James v. Kentucky,* 466 U.S. 341, 348-51, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)); *see also Barr v. City of Columbia,* 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), or if they are "novel [ ]" and unforeseeable. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *see also Ford,* 498 U.S. at 424, 111 S.Ct. 850.

First, the test ensures that federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule. As we said in *Cabrera v. Barbo,* 175 F.3d 307, 313 (3d Cir.1999), "a petitioner should be on notice of how to present his claims in the state courts if his

failure to present them is to bar him from advancing them in a federal court."

Second, the "'firmly established and regularly followed' test" prevents discrimination. "Novelty in procedural requirements," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 457, 78 S.Ct. 1163, can be used as a means of defeating claims that are disfavored on the merits. If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules"—directions of general applicability—rather than by whim or prejudice against a claim or claimant.

In this case, as noted, the District Court held that the state procedural rule on which the Pennsylvania Supreme Court based its decision was not "firmly established and regularly followed" at the relevant time. The Court's analysis proceeded in three steps.

First, the Court identified the relevant rule as "the rule that § 9545(b)(1) operates as an absolute, jurisdictional bar to hearing the merits of a late PCRA petition, and that no exceptions outside those in the statute may save a petition filed more than one year after the date judgment becomes final." App. I at 13. Second, the Court concluded that the relevant point in time was "the moment petitioner violated the procedural rule; that is, at the time Bronshtein's one-year window under § 9545(b)(1) closed." *Id.* Since direct

review of Bronshtein's conviction and sentence ended when the United States Supreme Court denied his petition for a writ of certiorari on October 20, 1997, the District Court concluded that the critical date was October 20, 1998. Finally, the Court found that the state procedural rule applied by the Pennsylvania Supreme Court was not "firmly established and regularly followed" on that date.

We agree with the District Court that the rule applied by the Pennsylvania Supreme Court was not firmly established and regularly applied until after Bronshtein missed the PCRA's one-year filing deadline. To be sure, the pertinent statutory provision, 42 Pa. Cons.Stat. Ann. § 9545(b), which took effect on January 16, 1996, appears on its face to impose a one-year deadline in all cases except those falling within three categories (none of which is applicable here).[1]

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1. This provision states in relevant part:

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> > (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
> >
> > (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not

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Nevertheless, as the District Court observed, strict enforcement of the provision did not begin immediately.

Well before the enactment of this provision, the Pennsylvania Supreme Court had begun to apply a "relaxed waiver rule" in capital cases. *See Commonwealth v. McKenna,* 476 Pa. 428, 383 A.2d 174 (1978). In *McKenna,* the Court stated that it bore a "duty to transcend procedural rules" in capital cases because of the "overwhelming public interest" in preventing unconstitutional executions. *Id.* at 180-81. As we have observed, *McKenna* for a time "firmly established that a claim of constitutional error in a capital case would not be waived by a failure to preserve it." *Szuchon v. Lehman,* 273 F.3d 299, 326 (3d Cir.2001).

Twenty years later, on November 23, 1998, the state supreme court changed course in *Commonwealth v. Albrecht,* 554 Pa. 31, 720 A.2d 693 (1998). After noting that it had long been the Court's " 'practice' to decline to apply ordinary waiver principles in capital cases," the Court stated that this

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> have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. Cons.Stat. Ann. § 9545(b)(1).

rule had "in effect, virtually eliminated any semblance of finality in capital cases." *Id.* at 700. The Court concluded that the "benefits of relaxed waiver at the PCRA appellate stage" were greatly outweighed by the need for finality and judicial efficiency, and the Court announced that the relaxed waiver rule would "no longer [apply] in PCRA appeals." *Id.*

On December 21, 1998, the state supreme court held in *Commonwealth v. Peterkin,* 554 Pa. 547, 722 A.2d 638 (1998), that the PCRA time bar applies to capital cases and is not superceded by the relaxed waiver rule. Finally, on March 2, 1999, the state supreme court held unequivocally in *Commonwealth v. Banks,* 556 Pa. 1, 726 A.2d 374 (1999), that the PCRA time limits are jurisdictional and thus not subject to judicial relaxation. Although one might argue that either *Albrecht* or *Peterkin* marked the point when it became firmly established that the PCRA time limits would be applied literally in capital cases, our opinion in *Fahy v. Horn,* 240 F.3d 239, 245 (3d Cir.2001), implies that the unavailability of judicially created exceptions to the PCRA time limits was less than perfectly clear until the state supreme court decided *Banks.* For present purposes, however, it is not necessary for us to decide whether *Albrecht, Peterkin,* or *Banks* marked the critical point in time because Bronshtein's one-year deadline expired before the earliest of the three dates. As of October 20, 1998—the one-year anniversary of the conclusion of direct review in Bronshtein's case—Bronshtein did not have fair notice that he would not be given the benefit of the "relaxed waiver" rule and that his failure to file his PCRA petition within the one-year statutory deadline would result in the dismissal of his petition. Moreover, holding Bronshtein strictly to the one-year deadline would have

denied him the more lenient treatment that the state courts had allowed other capital defendants up to that point. We thus agree with the District Court that the state procedural rule at issue in this case—the rule strictly requiring a capital defendant to file a PCRA petition within one year after the end of direct review—was not firmly established and regularly followed at the time in question.

Our analysis of the question of procedural default would proceed along a different path if the Pennsylvania Supreme Court, when it abandoned the doctrine of "relaxed waiver," had adopted what might be termed a "transitional rule," i.e., a rule imposing a special filing deadline for those cases in which a PCRA petitioner's one-year filing period expired prior to the end of the "relaxed waiver" era.[2] Accordingly, it would have made sense for the state supreme court to have adopted a rule requiring such petitioners to file within some specified time after the termination of the doctrine of "relaxed waiver." However, no such transitional rule was invoked by the state supreme court in this case, and none has been called to our attention. The only state law ground that we may consider in deciding the issue of procedural default in this case is the general one-year deadline. Because this rule was not firmly established and regularly applied on the date when Bronshtein's time ran out, the doctrine of procedural default

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2. The Pennsylvania Supreme Court has adopted such a rule in at least one analogous context. *See Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585 (2000) (when ground for filing second PCRA petition arises while first petition is still pending, petitioner may file second petition within 60 days after final decision on first petition).

does not apply in this case. We thus turn to the merits of the claims on which the District Court granted relief.

III.

Bronshtein argues (Claim I) that the trial court's jury instructions violated his right to due process because they permitted the jury to convict him of first-degree murder on the theory of co-conspirator liability without finding an essential element of the offense, *viz.*, that he had the specific intent to kill. Under Pennsylvania law, a defendant may not be convicted of first-degree murder under a co-conspirator liability theory unless the jury finds that the defendant personally had the specific intent to kill. *See Smith v. Horn*, 120 F.3d 400, 410 (3d Cir.1997). "The general rule of law [in Pennsylvania] pertaining to the culpability of conspirators is that each individual member of the conspiracy is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy." *Commonwealth v. Wayne*, 553 Pa. 614, 720 A.2d 456, 463 (1998). However, "[t]o be guilty of first degree murder, each co-conspirator must individually be found to possess the mental state necessary to establish first degree murder—*the specific intent to kill.*" *Id.* at 464 (emphasis in original).[3] This principle was settled at the time of Bronshtein's trial. *See Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961, 962 (1994).

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3. Compare *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ("major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the [Eighth Amendment] culpability requirement").

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In considering whether the jury instructions in this case adequately conveyed this critical feature of Pennsylvania homicide law,[4] we focus initially on the language that is claimed to be erroneous, but we must view this portion of the instructions "in the context of the charge as a whole." *See Smith,* 120 F.3d at 411. "The proper inquiry is whether there is a *reasonable likelihood* that the jury has applied the challenged instructions in a way that violates the Constitution." *Id.* (emphasis in original, citations and internal quotation marks omitted); *see Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

In the present case, Bronshtein was charged, *inter alia,* with first degree murder and conspiracy to commit murder. As we hereafter explain, while the trial court's instructions regarding the first degree murder charge were such that the jury could have convicted him of this charge without finding that he had a specific intent to kill Gutman, the court's instructions regarding conspiracy to commit murder and the jury's verdict of guilty on that charge demonstrate beyond a reasonable doubt that the jury made the required finding of specific intent. Accordingly, we conclude that any error in the first degree murder instructions was harmless.

The trial judge instructed the jury that Bronshtein could be found guilty of first degree murder based on any of three separate theories. First, the trial judge charged the jury, Bronshtein could be found guilty as a principal if the jury

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4. We do not apply the deferential standards of review set out in 28 U.S.C. § 2254(d) because this claim was not "adjudicated on the merits" by the state supreme court.

found that "each and every element of [the crime] was established as to him specifically . . . ." App. V, Pt. 2 at 1692. The trial court then correctly instructed the jury that the three elements needed to convict Bronshtein for the first-degree murder of Alexander Gutman were (1) that Gutman was killed, (2) that the defendant killed him, and (3) that the defendant did so with the specific intent to kill. *Id.*

The trial judge also instructed the jury that Bronshtein could be found guilty as an accomplice of the person who actually killed Gutman but that, in order to do so, the jury would have to find that Bronshtein had the specific intent to kill. The judge stated:

> A defendant is guilty of a crime if he is an accomplice of another person who commits the crime . . . .
>
> He is an accomplice if and only if with the intent of promotion or facilitating commission of the crime he encourages the other person to commit it or aids, agrees to aid or attempts to aid the other person in planning or committing it . . . .
>
> *[I]n order to find the defendant guilty of first-degree murder as an accomplice, you must find the Commonwealth has proven beyond a reasonable doubt that the defendant shared a specific intent to kill Alexander Gutman with the active perpetrator and encouraged or assisted the active perpetrator by comparable overt behavior.*

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> Remember when we talked about first-degree murder? That's the one that requires that specific intent to kill? Yes, it is possible to convict the defendant as an accomplice to that even if he's not the one who killed Mr. Gutman, but *you'd have to find that he shared that specific intent to kill Alexander Gutman before you can find him guilty as an accomplice,* and that he assisted the active perpetrator by some comparable overt behavior.

App. V, Pt. 2 at 1689-91 (emphasis added).

Finally, the trial court instructed the jury that it could find Bronshtein guilty of the various crimes with which he was charged under the theory of co-conspirator liability. The court stated:

> You may find the defendant [guilty] of either the crime of murder, robbery or theft as a conspirator if you're satisfied beyond a reasonable doubt: First, that the defendant agreed with this John Doe or Mr. X that the defendant would aid John Doe or Mr. X in committing either the crime of murder, robbery and/or theft; second, that the defendant so agreed with the intent of promoting or facilitating the commission of the crime; third, that while the agreement remained in effect, the crime of murder, robbery and/or theft was committed by this John Doe or Mr. X; and, fourth, that the crime of murder, robbery and/or theft, while it may differ from the agreed crime, was

> committed by John Doe or Mr. X in furtherance of his and the defendant's common scheme.
>
> What am I saying to you? If those four elements have been established, then, if you find that the defendant is guilty of the conspiracy, he is also guilty of anything that John Doe or Mr. X did in furtherance of it . . . .
>
> [I]f you find those things, then, he can be found guilty of whatever acts the co-conspirator did in the furtherance of that agreement reached between them.

Id. at 1687-89.

Unfortunately, this instruction misleadingly suggested that Bronshtein could be found guilty of first-degree murder even if he did not have the specific intent to kill. According to a literal reading of the instruction, the jury could find Bronshtein guilty of first-degree murder if it found that he had conspired to commit the robbery and that another conspirator had killed Gutman in furtherance of the robbery. Compounding the error, the instruction went on to say that if the jury found that the four elements set out above were established, Bronshtein was "guilty of anything that John Doe or Mr. X did in furtherance of [the conspiracy]."

While the instructions on liability as a principal or accomplice stressed the need to find a specific intent to kill, these instructions did not cure the defect in the instructions on co-conspirator liability. As the District Court put it:

"A reasonable jury could have understood the co-conspirator language to be an alternate means to establish first degree murder, *sans* a finding of specific intent to kill.'" Dist. Ct. Op. at 27.

For similar reasons, the flaw in the co-conspirator liability instructions was not adequately cured by the supplemental instructions on first-degree murder that were given, at the jury's request, during its deliberations.[5] At that time, the trial judge gave the jury the following "summary on first-degree murder": "what sets [first-degree murder] apart from second- and third-degree murder is that element of the specific intent to kill either personally, if you find that he did the act, or as a co-conspirator of one who had the specific intent to kill[.]" App. V, Pt. 2 at 1725. Although these supplemental instructions were accurate, they did not specifically address the theory of co-conspirator liability. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin*, 471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). *See also Whitney v. Horn*, 280 F.3d 240, 256 (3d Cir.2002). Viewing all of the first degree murder instructions together, we conclude that there is a reasonable probability that the jury, consistent with their terms, could have proceeded on the incorrect belief that a specific intent to kill was not needed in order to convict Bronshtein of first-degree murder on the theory of co-

5. These supplemental instructions on first-degree murder must be distinguished from the supplemental instruction on conspiracy, which we discuss below.

conspirator liability. We thus hold that the jury was improperly instructed on the theory of co-conspirator liability.

We further hold, however, that this error was harmless. As we explained in *Smith,* 120 F.3d at 416-17, an error of the type present here is subject to harmless error analysis. "In a collateral proceeding, the standard for harmlessness is 'whether the error had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 417 (quoting *California v. Roy,* 519 U.S. 2, 5, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) (quoting *Brecht v. Abrahamson,* 507 U.S. 619 at 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). In *Smith,* we elaborated:

> The Supreme Court has held that if a habeas court "is in grave doubt as to the harmlessness of an error," habeas relief must be granted. *O'Neal v. McAninch,* 513 U.S. 432, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). Thus, if the court concludes from the record that the error had a "substantial and injurious effect or influence" on the verdict, or if it is in "grave doubt" whether that is so, the error cannot be deemed harmless. *See Roy,* 519 U.S. at 5, 117 S.Ct. 337.

120 F.3d at 418 (parallel citations omitted).

Here, the jury's verdict finding Bronshtein guilty of conspiracy to commit murder convinces us that the error in

the instructions on co-conspirator liability was harmless.[6] After stating that Bronshtein was charged with conspiracy to commit murder, robbery and theft, the trial judge stated:

> [I]n order to find the defendant guilty of conspiracy to commit any one of those or all of them, you must be satisfied initially that the two elements of a conspiracy have been proven beyond a reasonable doubt. What are they? First, that the defendant agreed to aid another person. The Commonwealth merely defines that person or

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6. The jury specifically found Bronshtein guilty of conspiracy to commit murder, as well as conspiracy to commit robbery and conspiracy to commit theft. Significantly, the jury's verdict did not "lump" the object offenses together:

Court Clerk:	How say you on 3279-93.5, second count, criminal conspiracy, conspiracy to commit murder?
Presiding Juror:	Guilty.
Court Clerk:	How say you on conspiracy to commit to robbery?
Presiding Juror:	Guilty.
Court Clerk:	How say you on conspiracy to commit theft?
Presiding Juror:	Guilty.

App. V, Pt. 2 at 1747.

> identifies that person as John Doe or Mr. X, meaning they don't know who it is.
>
> That the defendant agreed to aid another person, whoever it was, in the planning or commission of the crimes of murder, robbery or theft; and, second, that the defendant did so with the intent of promoting or facilitating commission of the crimes of murder, robbery and/or theft. Those are the two elements.

Id. at 1684-85. The most reasonable interpretation of these instructions is that, in order to find Bronshtein guilty of murder, the jury had to find that he had "the intent of promoting or facilitating commission of the crime[] of murder."[7]

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7. Bronshtein contends that these instructions "lumped together the three offenses of murder, robbery and theft and created a reasonable likelihood that the jury would convict [him] of conspiracy to commit all three offenses merely because he conspired to commit one of them and Karlitsky [or whoever the second individual at the store was] then committed the others." Bronshtein's Br. at 58. In other words, Bronshtein argues that the jury might have understood the instructions to mean that they could find Bronshtein guilty of conspiracy to commit murder if they found merely that Bronshtein intentionally aided in planning or carrying out a theft. Such a reading of the instructions is contrary to common sense and, in our view, unlikely, but because the trial judge gave the supplemental instructions discussed above, we need not decide whether these instructions standing alone would be sufficient to establish harmless error. We note that, although the District Court held that the error in the co-conspirator liability instructions was not harmless, the District Court did not consider the impact of the supplemental instructions on conspiracy to commit murder that were given during the jury deliberations.

This point was driven home with the supplemental instructions on conspiracy to commit murder that the court gave during the jury deliberations. As the Supreme Court has noted, this is the point in a trial when "[o]ne would expect most of [a jury's] reflection about the meaning of the instructions to occur [.]" *Francis v. Franklin*, 471 U.S. at 321 n. 7, 105 S.Ct. 1965. The trial judge in this case told the jury:

> [I]n order to find the defendant guilty of conspiracy to commit murder, you must be satisfied that two elements of the conspiracy have been proven beyond a reasonable doubt: First, that the defendant agreed to aid another person, namely, this John Doe or Mr. X, in either the planning or the commission of the crime of murder. That's the first element. He agreed to aid another person in either the planning or the commission of the crime of murder—first element.
>
> Second, that the defendant did so with the intent of promoting or facilitating the commission of the crime of murder.

Id. at 1733-34.

After receiving these instructions, the jury found Bronshtein guilty of conspiracy to commit murder. In returning that verdict, the jury presumably followed the court's instructions relating to that offense, *see Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d

727 (2000), and therefore the jury must have found that Bronshtein participated in "the planning or the commission of the crime of murder" and that he "did so with the intent of promoting or facilitating the commission of the crime of murder." In other words, the jury must have found that Bronshtein had the specific intent to kill. It follows that the error in the instructions on the theory of co-conspirator liability cannot have affected the jury's verdict on the charge of first-degree murder. Even if the jury based that verdict on the theory of co-conspirator liability, and even if the jury proceeded on the erroneous belief that this theory did not require proof of a specific intent to kill, the jury's guilty verdict on the charge of conspiracy to commit murder shows that the jury found that Bronshtein had that intent.

The Pennsylvania Supreme Court's decision in *Wayne*, 553 Pa. 614, 720 A.2d 456 (1998), is instructive. In *Wayne*, the Court concluded that the defendant was not prejudiced by his counsel's failure to object to jury instructions that, like the ones here, permitted the jury to convict him of first-degree murder as a co-conspirator without finding that he had the specific intent to kill. *See Wayne*, 720 A.2d at 465. The Court reached this conclusion because the defendant was also convicted of conspiracy to commit murder. *See id.* The Court explained:

> A conspiracy to kill presupposes the deliberate premeditated *shared* specific intent to commit murder . . . . In this case, the conspiracy was a conspiracy to kill. The conspiracy had only one object, the deliberate decision to take a life. Once this jury determined that appellant was guilty of

> conspiracy, given the sole object of that conspiracy, the only logical conclusion to reach is that this jury also determined, beyond a reasonable doubt, that appellant possessed the specific intent to kill.

Id. (emphasis in original). *See also Commonwealth v. Bailey*, 463 Pa. 354, 344 A.2d 869, 877 n. 16 (1975) ("A conspiracy to commit murder would necessarily indicate that the killing was 'willful, deliberate, and premeditated.'"); *Commonwealth v. Stein*, 401 Pa.Super. 518, 585 A.2d 1048, 1050 n. 6 (1991) ("[T]he 'intent' element required to be proven by the Commonwealth is the same for accomplice liability as for conspiracy.").[8] We agree with this analysis and hold that the error in the instructions on co-conspirator liability was harmless under the standard applicable in a federal habeas proceeding.

Bronshtein contends that our decision in *Smith* shows that *Wayne* "does not control here," Bronshtein's Br. at 57, but *Smith* is readily distinguishable. There, the conspiracy instructions were so ambiguous that they created the reasonable likelihood that the jury convicted the defendant of conspiracy to commit murder without finding that he had

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8. By contrast, in *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961, 963 (1994), the Pennsylvania Supreme Court found that an error in the jury instructions similar to the one in *Wayne* (and the one here) was not harmless. However, in that case the defendant was convicted of conspiracy to commit burglary but not conspiracy to commit murder. *See Wayne*, 720 A.2d at 465 n. 7. Obviously, conspiracy to commit burglary, unlike conspiracy to commit murder, does not require proof of an intent to kill.

the intent to enter into the conspiracy to commit murder. *See Smith*, 120 F.3d at 412-13. Furthermore, the trial court's attempt to explain the ambiguous instructions actually made matters worse: it "conveyed the impression that Smith was criminally liable for conspiracy to commit murder if he intended to enter into a conspiracy to commit *robbery* [.]" *Id.* at 413 (emphasis in original). In short, in *Smith*, unlike *Wayne* or the present case, it was reasonably likely that the jury did not find that the defendant had the intent to enter into a conspiracy to commit murder, i.e., a specific intent to kill. Here, as we have explained, the supplemental instructions were very clear in telling the jury that it could not find Bronshtein guilty of conspiracy to commit murder unless it found that he had that intent. For these reasons, we must reverse the decision of the District Court insofar as it relates to Bronshtein's first-degree murder conviction.

IV.

We now address Bronshtein's argument (Claim IX) that the trial court violated his right to due process by failing to instruct the jury that under Pennsylvania law a defendant who is convicted of first-degree murder must receive either a sentence of death or a sentence of life imprisonment without the possibility of parole. The District Court held that this claim has merit. On appeal, the Commonwealth contests the District Court's holding on two grounds.

A.

The Commonwealth's first argument, as we understand it, is that *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct.

2187, 129 L.Ed.2d 133 (1994), the seminal Supreme Court case on which Bronshtein's claim is predicated—is inapplicable because *Simmons* does not apply retroactively to cases in which direct review ended prior to that decision. *See O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997). However, the District Court properly rejected this argument because *Simmons* was decided long before the judgment in Bronshtein's case became final for retroactivity purposes on October 27, 1997, the date when the Supreme Court denied certiorari. *See Beard v. Banks*, __ U.S. __, 124 S.Ct. 2504, 2510, 159 L.Ed.2d 494 (2004) ("State convictions are final 'for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.'") (citation omitted). Accordingly, the Commonwealth's argument is meritless.

B.

The Commonwealth's remaining contention is that the prosecution's arguments and the testimony that it elicited at the penalty phase did not put the issue of Bronshtein's future dangerousness at issue in the way needed to trigger *Simmons* and the subsequent related cases of *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001), and *Kelly v. South Carolina*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002). Because the Pennsylvania Supreme Court did not adjudicate this claim on the merits, the standards of review set out in 28 U.S.C. § 2254(d) are inapplicable. Furthermore, because the Commonwealth does not argue that either *Shafer* or *Kelly* announced "new rules"

within the meaning of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), we need not and do not decide whether such an argument would have merit, *see Horn v. Banks*, 536 U.S. 266, 271, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002), and we consider *Shafer* and *Kelly* to be applicable in this appeal.

In *Simmons*, the prosecutor explicitly argued that the jury should impose a death sentence in order to protect society from the defendant. The prosecutor stated that a death sentence would be "a response of society to someone who is a threat" and would be "an act of self-defense." 512 U.S. at 157, 114 S.Ct. 2187. The Supreme Court held that under these circumstances the trial judge was required to instruct the jury that the defendant, if not sentenced to death, would have received a sentence of life imprisonment without the possibility of parole. The plurality opinion stated that "where the defendant's future dangerousness *is at issue*, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156, 114 S.Ct. 2187 (emphasis added). However, as we noted in *Rompilla v. Horn*, 355 F.3d 233, 265 (3d Cir.), *cert. granted*, __ U.S. __, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004), Justice O'Connor's controlling concurrence may be read as adopting a narrower holding, namely, that the dispositive question is not whether a defendant's future dangerous is "at issue" but whether "*the prosecution argues* that the defendant will pose a threat to society in the future." 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). *See also Shafer*, 532 U.S. at 49, 121 S.Ct. 1263.

Appendix A

As we also observed in *Rompilla*, 355 F.3d at 266, the holding in *Simmons* was arguably broadened in *Kelly*. There the prosecutor stated in his penalty phase opening: "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." 534 U.S. at 248, 122 S.Ct. 726. The prosecution then presented evidence that while in prison, Kelly had made a knife, had attempted to escape from prison, and had planned to hold a female guard as a hostage. *See id.* The state also brought out evidence of "Kelly's sadism at an early age, and his inclination to kill anyone who rubbed him the wrong way." *Id.* at 248-49, 122 S.Ct. 726 (citation omitted). During its closing argument, the state referred to Kelly as "the butcher of Batesburg," "Bloody Billy," and "Billy the Kid." *Id.* at 249-50, 122 S.Ct. 726. In addition, the prosecutor told the jury that "Kelly doesn't have any mental illness. He's intelligent .... He's quick-witted. Doesn't that make somebody a little more dangerous .... [D]oesn't that make him more unpredictable for [the victim] .... murderers will be murderers. And he is the cold-blooded one right over there." *Id.* at 250, 122 S.Ct. 726.

The *Kelly* Court concluded that the trial judge had an obligation to give a parole ineligibility instruction. The Court stated that "[t]he prosecutor accentuated the clear implication of future dangerousness raised by the evidence and placed the case within the four corners of *Simmons*." *Id.* at 255, 122 S.Ct. 726. The Court observed that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." *Id.* at 254,

122 S.Ct. 726. The Court also acknowledged that "it may well be that the evidence in a substantial proportion, if not all, capital cases will show a defendant likely to be dangerous in the future." *Id.* at 254 n. 4, 122 S.Ct. 726. But the Court declined to decide whether a defendant is entitled to a parole ineligibility instruction "when the State's evidence shows future dangerousness but the prosecutor does not argue it." *Id.*

In the present case, the prosecution not only put Bronshtein's future dangerousness "at issue" but "argue[d] that the defendant [would] pose a threat to society in the future." *Simmons,* 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). During its closing argument at the penalty stage, the prosecutor made the following statements:

> Ladies and gentlemen, the medical testimony in this case was significant because it tells you something about the psyche or persona of this man. *He can't conform to what is required in society. The doctors have told you that he's anti-social.* He's prone to lying. He's prone to stealing. *He's prone to living a life of crime.*
>
> Whatever the seeds were that got him there, they're planted, and that tree has grown. He's grown into a twenty-two-year-old person now regardless of how the seeds were planted.
>
> You have to take a look at what effect that has had and what effect it had at the time he committed

> these crimes. *The doctors have told you he's a man that can't conform to the needs of society.*

App. VI at 1909-10 (emphasis added).

Even without considering "the medical testimony" to which the prosecutor referred, it is evident that these comments, although more clinical than those in *Simmons*, conveyed the message that Bronshtein presented a threat of future lawlessness. We agree with the District Court's evaluation of these comments:

> [T]he references to Bronshtein's inability to 'conform to what is required in society' and the fact that he was 'anti-social,' in the context of the present and the future by reference to what Bronshtein is "going to" and "prone to" do, make clear that the Commonwealth was suggesting to the jury that it should impose the death penalty because of Bronshtein's inability to function in society in the future. The prosecutor's assertion that [Bronshtein] was "prone to living a life of crime," when placed in the context of the stark choice of life in prison or death, would suggest to any juror that petitioner would pose a danger to society if he was released from prison. The none-too-subtle implication of these arguments is that Bronshtien should be put to death because if he were ever released, he could not "conform to the needs of society," and was "going to" continue "living a life of crime" and engaging in dangerous, violent conduct.

Dist. Ct. Op. at 36-37. Thus, the import of the penalty phase closing in itself is clear enough.

When the "the medical testimony" to which the prosecutor referred in the closing is also taken into account, the significance of the prosecutor's statements becomes even clearer. At the penalty phase, Bronshtein called a psychologist, Gerald Cooke, to testify to "psychological mitigating factors." App. VI at 1835. Dr. Cooke testified that Bronshtein suffered from paranoid personality disorder, anti-social personality disorder, and depression. *See id.* at 1838, 1840. On cross-examination, the Commonwealth elicited from Dr. Cooke a litany of dangerous tendencies that persons with these disorders often exhibit. The questioning went as follows:

> Q: One of the features of [a person with an anti-social personality disorder] is he tends to be irresponsible; correct?
>
> A: Well, one of the features of anti-social personality can be irresponsibility. I don't know if that's necessarily a criteria that fits him. He fits a number of the other criteria.
>
> Q: It can be anti-social behavior; correct?
>
> A: Absolutely.
>
> Q: Including criminal activity; correct?
>
> A: Correct.

Appendix A

Q: Lying?

A: Yes.

Q: Stealing?

A: Yes.

Q: Fighting?

A: Yes.

Q: Being very aggressive; correct?

A: Yes.

Q: They can be prone to being irritable; correct?

A: Yes.

Q: Prone to getting repeatedly into physical fights; correct?

A: Can be . . . .

Q: Failed to conform to social norms; correct?

A: That is true.

Q: Repeatedly can perform anti social acts; correct?

A: Yes . . . .

Q: They also tend to express no remorse, don't they?

A: That's true.

Q: No remorse about the effects of their behavior on other people?

A: They often don't have insight to the effects of their behavior on themselves or on other people.

Q: In other words, a lot of people who have anti-social personality disorders can't play by the rules in a civilized society; correct?

A: True.

Id. at 1855-1858.

The prosecutor then questioned Dr. Cooke regarding Bronshtein's paranoid personality disorder:

Q: Dr. Cooke, with regard to the paranoid personality disorder, they're also people that can react quickly with anger; correct?

A: Yes.

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Q: And are likely to counterattack if they feel threatened; correct?

A: They are likely to see themselves as being threatened, and many of them sort of follow the kind of attitude that the best defense is offense.

Q: In other words, they're more likely to feel threatened than the normal person; correct?

A: True, and that's what being paranoid means.

Q: Because they're more likely to feel threatened, they're more likely to counterattack because of the threat they feel; correct?

A: That is true.

Q: They can bear grudges for a long time; correct?

A: True.

Q: And they can even get to the point where they never forgive different insults people have done to them; correct?

A: True.

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Q: They're viewed as secretive?

A: Yes.

Q: Devious?

A. Sometimes.

Q: Scheming?

A: Sometimes.

Q: Have great difficulties accepting self-criticism?

A: That's true.

Q: Dr. Cooke, Mr. Bronshtein has a combination of the two—paranoid personality disorder and anti-social personality disorder—doesn't he?

A: And depression.

. . .

Q: Doctor, it's certainly a potentially lethal combination of personality disorders, isn't it?

A: Could be.

Id. at 1858-1860.

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The Commonwealth also presented rebuttal evidence through its own mental health expert, Dr. Timothy J. Michaels. The Commonwealth elicited the following testimony from Dr. Michaels:

Q: [W]hat is your agreement or disagreement with the diagnoses which [Dr. Cooke] has made?

A: . . . I certainly agree with the anti-social personality disorder. What that means is, this young man has gotten in trouble throughout his life. He doesn't learn by experience. He's impulsive. He continues to get in trouble within the prison system. He acts out, justifies his behavior. So even after he has been incarcerated, there's ongoing difficulties.

. . . When you're anti-social, you don't follow the rules. You don't learn by experience. You think you're right and other people are wrong . . . .

I also agree with the paranoid personality disorder . . . .

He's paranoid. Basically, he's looking over his shoulder. He doesn't trust people, doesn't trust most people . . . .

> This combination of not trusting people and then acting out, not following the rules is an explosive combination in my opinion. . . . So I see that as a serious, very serious behavioral problem that this young man has.
>
> . . .
>
> Q: Dr. Michaels, what findings did you make with regard to this personality disorder or these personality disorders with having remorse?
>
> A: . . . Individuals who are anti-social don't have remorse. They don't learn. They're not sorry for their behavior. They don't learn from experience. So they do this over again.
>
> And instead of being remorseful, unfortunately there is acceleration of behavior. I think I can get away with it—even though you get caught. I can outsmart the people[.]

App. VI at 1869-71, 1874.

Taken together, the testimony of Drs. Cooke and Michaels suggested the following: that Bronshtein's "combination of personality disorders" could be "lethal" or "explosive"; that he was prone to lie, scheme, steal, fight, and act very aggressively; that he was much more likely than a normal person to distrust others, bear grudges, feel

threatened, and respond with a counterattack; that he was unable to "play by the rules in a civilized society"; that he was probably remorseless, and unlikely to learn from experience, and thus prone to commit the same crimes "over again"; and that there would probably be an "acceleration" of his anti-social behavior.

The prosecution's penalty phase closing must be viewed as incorporating these points. As noted, the prosecutor asked the jury to recall "the medical testimony," referred twice to what "the doctors" had told the jury, and summarized that testimony as saying that Bronshtein is "anti-social," "prone to living a life of crime," and "can't conform to the needs of society." In any realistic sense of the concept, the prosecutor "argue[d] that the defendant [would] pose a threat to society in the future." *Simmons*, 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). And it goes without saying that the Bronshtein's future dangerousness was put at issue within the meaning of *Kelly*. In the words of that decision, "[t]he prosecutor accentuated the clear implication of future dangerousness raised by the evidence." 534 U.S. at 255, 122 S.Ct. 726. We thus reject the Commonwealth's argument that the prosecution's presentation at the penalty phase was insufficient to trigger the obligation imposed by *Simmons*, *Shafer*, and *Kelly*.

Having considered and rejected the Commonwealth's arguments regarding *Simmons* and its progeny, we have before us no ground for reversing the order of the District Court insofar as it held that Bronshtein's death sentence is unconstitutional under those precedents. In light of our decision on this issue, we have no occasion to decide whether,

as the District Court held, that sentence is unconstitutional for the additional reason that the jury was improperly instructed regarding the aggravating factor set out in 42 Pa. Cons.Stat. Ann. § 9711(d)(6) (commission of homicide while perpetrating felony) and that there was insufficient evidence to prove that factor.[9]

V.

We now consider the claims raised in Bronshtein's cross-appeal. As noted, Bronshtein asks us to issue a certificate of appealability on these claims, and we must do so if he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). On the merits, our review of the decision of the District Court is plenary, as the District Court relied exclusively on the state court record and did not hold an evidentiary hearing. *Hartey v. Vaughn,* 186 F.3d 367, 371 (3d Cir.1999).

A.

Bronshtein argues that the prosecution violated *Batson v. Kentucky, supra,* by exercising a peremptory challenge based on religion and ethnic background. During collective voir dire, the trial court asked the prospective jurors whether they had "any moral, religious or other ethical beliefs which would prevent [them] from considering the imposition of

9. The law concerning § 9711(d)(6) is not in dispute and, now that the specific language used by the trial court has been challenged, there is no reason to expect that the same instruction will be repeated if a new penalty-phase proceeding is held.

the death penalty [.]" Bronshtein's App. II at 293. Ten of the 30 prospective jurors—including Jan Eidelson—responded in the affirmative.

Later, during individual voir dire, defense counsel asked another prospective juror, Nanette Phyllis Honigman, whether she was "of Jewish heritage," and she responded that she was not. App. II at 420-21. After Ms. Honigman was dismissed for cause on unrelated grounds, the trial judge raised the issue whether it was appropriate to ask potential jurors about their religions. *Id.* at 421. The judge suggested that such an inquiry would not be reasonable unless a juror expressed an unwillingness to consider a death verdict for religious reasons. *Id.* Defense counsel explained that his only reason for doing so "would be for the possible *Batson* issues, it's whether the juror was of the same Jewish heritage as Mr. Bronshtein." *Id.* The prosecutor seems to have taken the position that *Batson* does not apply to peremptory challenges based on religion, while defense counsel and Bronshtein himself contended that striking a prospective juror because the person is Jewish would be a challenge based on "nationality" or "race" and would thus fall within *Batson*. *Id.* at 423-24. The trial judge then stated that Judaism is "a religion, it's not a nationality" and ruled that a peremptory challenge based on Judaism did not present "a *Batson* issue." *Id.* at 424-25. However, because the judge thought that an inquiry into a juror's religion might be justified for the limited reason of exploring whether the juror would be willing to consider a death sentence, the judge asked counsel to provide advance warning before asking any questions along those lines. *Id.* at 425.

Immediately after this exchange, the prosecutor stated that he wanted to ask Ms. Eidelson about her religion "only because of the educational background" noted in her information sheet, namely, that she had written that she had attended a school called "Friends Central." App. II at 426. The trial judge responded that this inquiry was legitimate because "it cannot be disputed that if someone is a Quaker they hold a religious belief that would prevent them, probably, from serving on this jury." *Id.*

When Ms. Eidelson came up for individual voir dire a short time later, the trial judge questioned her first. In response to the court's questions, she stated that she could vote to impose a death penalty but that "it would not be a comfortable thing" and "would [not] be easy." App. II at 429, 435. She expressed reservations about being sequestered for the two weeks that the trial was expected to last, stating that she "wouldn't want to be in a situation where [she] could not have contact with [her] support system[.]" *Id.* at 429. She also stated that, although she was a graduate of Friends Central High School, she was not a Quaker. *Id.* at 437. Finally, when the judge asked her whether she "would have any tendency to be biased or prejudiced against [Bronshtein] because he is a Russian-Jew," Ms. Eidelson answered that she did not think that she would and added: "Well, I need to let you know, my dad's parents came from Russia." *Id.* at 439.

Defense counsel questioned Eidelson next. In response to his questioning, she stated that her "dad's parents were Russian-Jews" and that her mother was Jewish. App. II at 440. The prosecutor then questioned Ms. Eidelson briefly

and inquired only whether, if the jury voted for the death penalty and the jurors were polled, she would be able to stand up in open court and state that she had voted to impose that sentence. App. II at 443-45. She answered in the affirmative. *Id.* at 445.

After Ms. Eidelson left the courtroom, defense counsel stated that she was acceptable, but the prosecutor exercised a peremptory strike against her. App. II at 445. Defense counsel objected, claiming that the prosecution had exercised the strike in violation of *Batson*, but the trial judge rejected the objection without explanation. *Id.* at 446.

On direct appeal, the Pennsylvania Supreme Court found it unnecessary to resolve the question whether "'Russian-Jewish' is an ethnic classification for the purposes of a *Batson* claim[.]" *Bronshtein*, 691 A.2d at 915. First, the Court held that Bronshtein "failed to develop a record setting forth the race or ethnicity of the rest of the venire or the jurors eventually empaneled as required by [*Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621 (1995)]." Second, the Court stated:

> [T]he record reveals that the prospective juror equivocated on the death penalty on moral, religious and philosophical grounds and expressed serious reservations about serving on the jury because it would entail being separated from her 'support group' during the anticipated two weeks of sequestration . . . . Reasons such as these have been found by this court to be a proper basis for exercising a peremptory challenge.

Id.

Appendix A

The District Court discussed Bronshtein's claim in some detail. *See* Aug. 16, 2001 Mem. at 2-8. The District Court expressed disagreement with the state courts on three grounds. The District Court opined that "it is likely that the trial judge was wrong on the issue of whether Jews were a cognizable group under *Batson*." *Id.* at 4. The District Court also disagreed with the state supreme court's view that *Batson* "requires a defendant [to] produce evidence of the race of all venirepersons struck by the prosecutor, the race of prospective jurors stricken by the defense, and the racial makeup of the final jury selected." *Id.* at 8. The District Court "read *Batson* to be far less exacting in its evidentiary requirements" and stated that "there are many evidentiary avenues a petitioner may travel to bolster his *Batson* claims." *Id.* Finally, the District Court disagreed with the state supreme court's approach in rejecting Bronshtein's claim on the ground that the record revealed legitimate grounds on which the strike of Ms. Eidelson could have been based. *Id.* at 6. The District Court wrote:

> *Batson* requires the prosecutor to reveal her *actual* reasons for striking a juror. Where the prosecutor has not done so, whether on her own initiative or because of the trial court's ruling, an appellate or habeas court should not later divine reasons that might have motivated the prosecutor, however tempting that may be, and regardless of how abundant or logical the possible reasons may seem.

Id. (emphasis in original).

The District Court nevertheless rejected Bronshtein's *Batson* claim on the ground that he had failed to make out a prima facie case. The Court noted that "[t]he only record evidence petitioner pointed to at trial" or in the federal habeas proceeding was "the undisputed fact that the prosecutor used a peremptory challenge to exclude from the jury the only person in the *venire* who shared petitioner's Russian-Jewish ancestry." Aug. 16, 2001 Mem. at 6-7. The District Court also noted that "it was petitioner's counsel, not the prosecutor, who asked two jurors whether they were Jewish" and that "[n]othing in the record indicate[d] that the prosecutor was interested in whether the jurors shared a common ethnic heritage with the defendant." *Id.* at 7-8.

Because one of the grounds given by the Pennsylvania Supreme Court for rejecting Bronshtein's claim was his failure to develop the record in accordance with one of that Court's prior decisions, *Commonwealth v. Simmons,* 541 Pa. 211, 662 A.2d 621 (1995), we begin by discussing the question of procedural default. We hold that consideration of Bronshtein's *Batson* claim is not barred for two reasons. First, the Commonwealth has not argued that the claim is procedurally barred, and we are not required to raise this issue sua sponte. *See Smith v. Horn,* 120 F.3d at 408-09. Second, we understand *Commonwealth v. Simmons* to represent an interpretation of what *Batson* requires, not an independent state procedural rule. In *Commonwealth v. Simmons,* the Pennsylvania Supreme Court accurately summarized *Batson* 's holding as follows:

> To sustain a *prima facie* case of improper use of peremptory challenges, a defendant must establish

> the following: (1) the defendant is a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; (2) the defendant can then rely on the fact that the use of peremptory challenges permits "those to discriminate who are a mind [sic] to discriminate; and, (3) the defendant, through facts and circumstances, must raise an inference that the prosecutor excluded members of the venire on account of their race....

662 A.2d at 631. The Court then continued:

> *This third prong* requires defendant to make a record specifically identifying the race of all the venirepersons removed by the prosecution, the race of the jurors who served and the race of jurors acceptable to the Commonwealth who were stricken by the defense.

Id. (emphasis added). It thus seems clear that the *Commonwealth v. Simmons* procedural requirements represent an interpretation of *Batson*, not a state procedural rule.

We therefore proceed to the merits of Bronshtein's claim. Because this claim was "adjudicated on the merits" in state court, the narrow standards of review set out in 28 U.S.C. § 2254(d) apply. We must thus decide whether the state supreme court's "adjudication of the claim . . . resulted in a decision that was *contrary to*, or involved *an unreasonable*

application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added).

A state court adjudication is "contrary to" Supreme Court precedent if it results from the application of "a rule that contradicts the governing law set forth" by the Supreme Court or is inconsistent with a Supreme Court decision in a case involving "materially indistinguishable" facts. *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "A state court decision fails the 'unreasonable application' prong only 'if the court identifies the correct governing rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular case or if the state court either unreasonably extends a legal principle from the Supreme Court's precedent to a new context where it should not apply or unreasonably refuses to extend the principle to a new context where it should apply.'" *Rico v. Leftridge-Byrd,* 340 F.3d 178, 181 (3d Cir.2003) (citations omitted).

Before applying these standards to the present case, we note that we agree with the District Court that the Pennsylvania Supreme Court clearly misinterpreted *Batson.* First, *Batson* does not invariably demand compliance with the procedural requirements set out in *Commonwealth v. Simmons,* 662 A.2d at 631. It is noteworthy that *Batson* discussed what a criminal defendant must do to establish a prima facie case without hinting that a defendant must always satisfy anything like the rigid *Commonwealth v. Simmons* requirements. More important, *Batson* 's specific examples of how a prima facie case may be established make it clear

that the *Commonwealth v. Simmons* requirements need not always be met. *Batson* stated that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97, 106 S.Ct. 1712. In other words, a stark pattern—say, peremptorily striking numerous African American jurors and no others—could suffice without the creation of a record regarding "the race of the jurors who served and the race of the jurors acceptable to the [prosecution] who were stricken by the defense." *Commonwealth v. Simmons,* 662 A.2d at 631. *Batson* further stated that a "prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." 476 U.S. at 97, 106 S.Ct. 1712. Thus, in some circumstances, suspicious questioning, coupled with strikes that seem to implement the thrust of the questioning, may be enough. In short, a prima facie case may be established by "all relevant circumstances." *Id.* at 96, 106 S.Ct. 1712. While the factors noted in *Simmons* are certainly relevant, in the words of the District Court, "there are many evidentiary avenues a petitioner may travel to bolster his *Batson* claims." Aug. 16, 2001 Mem. at 8.

Second, the Pennsylvania Supreme Court clearly misinterpreted *Batson* insofar as it rejected Bronshtein's claim on the ground that the record suggested legitimate reasons that *could* have motivated the prosecutor to exercise the contested peremptory challenge. Under *Batson,* if the objecting party establishes a prima facie case, the party exercising the challenge must state its actual reasons, and the trial judge must make a finding regarding the challenging party's motivation. *See* 476 U.S. at 97-98, 106 S.Ct. 1712.

In light of our conclusion that the state supreme court misinterpreted *Batson*, we conclude that the state supreme court's decision fails to satisfy the standards set out in 28 U.S.C. § 2254(d)(1). The "contrary to" prong is violated because the state supreme court "applie[d] a rule that contradicts the governing law set forth" by the Supreme Court, *Williams*, 529 U.S at 405, 120 S.Ct. 1495. And the "unreasonable application" prong is also contravened because the state supreme court did not "identif[y] the correct governing rule from the Supreme Court's cases." *Rico*, 340 F.3d at 181. It does not follow, however, that Bronshtein is entitled to relief.

A state prisoner's federal habeas petition may be granted "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, if a petitioner's custody does not in fact violate federal law—i.e., if the petitioner's claims fail even de novo review—the petitioner is not entitled to habeas relief regardless of the correctness of the state court's analysis of those claims. This conclusion follows naturally from the longstanding rule that federal courts will not entertain habeas petitions to correct errors that do not undermine the lawfulness of a petitioner's detention. *See McNally v. Hill*, 293 U.S. 131, 135, 55 S.Ct. 24, 79 L.Ed. 238 (1934) (errors may not be attacked on one count of indictment where sentence was lawfully imposed after conviction on another count), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968).

Our conclusion also follows naturally from the language of 28 U.S.C. § 2254(d). Under the "contrary to" prong of § 2254(d)(1), it is the state supreme court's "decision," not its reasoning, that must be "contrary to" clearly established Supreme Court precedent. As we put it in *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir.1999) (en banc) (emphasis added), the "contrary to" prong applies when "Supreme Court precedent requires the contrary *outcome*." Likewise, our decision in *Werts v. Vaughn*, 228 F.3d 178, 196-97 (3d Cir.1999) (quoting *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir.1998)) (emphasis added), glossed the "contrary to" language as entitling a petitioner to relief only if the petitioner "shows that 'Supreme Court precedent requires an *outcome* contrary to that reached by the relevant state court.'"

Accordingly, both the terms of the habeas statute and common sense dictate that Bronshtein cannot obtain relief on his *Batson* claim unless application of a correct interpretation of that decision leads to the conclusion that his rights were violated.

Applying plenary review, we agree with the District Court that Bronshtein failed to make out a prima facie case.[10] First, it is relevant that Bronshtein's claim is based on a single strike. We do not hold that a prima facie case always requires

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10. We therefore have no need to address the question whether Bronshtein would be entitled to relief if he had shown that the peremptory challenge at issue was based on "religious affiliation," *see United States v. DeJesus*, 347 F.3d 500, 510 (3d Cir.2003) (reserving decision on question), or ethnicity. *See Rico v. Leftridge-Byrd*, 340 F.3d 178, 182- 84 (3d Cir.2003).

more than one contested strike, but the absence of a pattern of strikes is a factor to be considered. In this connection, it is relevant (though not, as the state supreme court held, dispositive) that the record does not reveal whether the prosecutor passed up the opportunity to strike other prospective jurors who were Jewish or who had ancestors who once lived in Russia. *See Simmons v. Beyer,* 44 F.3d 1160, 1167 (3d Cir.1995) (pattern of strikes and number of racial group members in panel relevant); *United States v. Clemons,* 843 F.2d 741, 747-48 (3d Cir.1988) (same).

Second, the nature of the crime did not provide a reason for heightened suspicion about the prosecution's reason for striking Ms. Eidelson. *See Simmons v. Beyer,* 44 F.3d at 1167 (nature of crime and race of accused and victim relevant); *Clemons,* 843 F.2d at 748 (same). There was no suggestion that religion or ethnicity played any role in the murder, and the accused and the victim shared the same religion and ethnic background.

Third, the prosecutor's questions and statements during voir dire did not suggest that Ms. Eidelson was peremptorily challenged because of her religion or ethnicity. *See Simmons v. Beyer,* 44 F.3d at 1167 (prosecutor's questions relevant); *Clemons,* 843 F.2d at 748 (same). It was defense counsel who first asked a juror whether she was Jewish. The prosecutor expressed an interest in whether Ms. Eidelson was a Quaker, not whether she was Jewish, and his only question to her concerned her ability to vote for the death penalty. We agree with the District Court that these facts are insufficient

to make out a prima facie case, and we therefore reject Bronshtein's *Batson* claim on this ground.[11]

VI.

We now consider two issues relating to the trial court's evidentiary rulings. First, Bronshtein argues that the trial court violated his federal constitutional rights to a fair trial, to present a defense, to due process, and to confrontation by excluding proposed testimony by private investigator Alan Hart. Second, Bronshtein contends that the trial court violated his right to due process by admitting his confession to the Slobotkin murder for the limited purpose of showing the identity of the person who shot and killed Gutman.

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11. Bronshtein contends that the strike of Ms. Eidelson was suspicious because, immediately after the trial judge ruled that *Batson* does not prohibit peremptory challenges based on religion, the prosecutor expressed an interest in asking about the religion of a prospective juror "with a Jewish-sounding last name." Bronshtein's Br. at 84-86. These circumstances are relevant, but particularly in light of the reason volunteered by the prosecutor, i.e., Ms. Eidelson's attendance at Friends Central High School, we are not persuaded that a prima facie case was established.

Bronshtein also contends that the following facts support a *prima facie* case: (1) the Commonwealth exercised a peremptory strike against a non-Jewish prospective juror who had lived for some time in a predominantly Jewish neighborhood and (2) the Commonwealth did not strike other venirepersons who shared some of Ms. Eidelson's characteristics, e.g., her marital and employment status, educational background, and lack of military service. *See* Bronshtein's Br. at 86-88. These factors provide slight support at best for Bronshtein's position.

Appendix A

A.

Before reaching the merits of these claims, we must consider whether review is precluded by non-exhaustion or procedural default. Without an express waiver by the state, a federal court is allowed under 28 U.S.C. § 2254(b)(1)(A) to grant a state prisoner's habeas petition only if the petitioner has exhausted all available state remedies. In order to satisfy the exhaustion requirement, a federal habeas claim must have been "fairly presented" to the state courts. *Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). This means that a petitioner must "present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn,* 172 F.3d 255, 261 (3d Cir.1999). "It is not enough that all the facts necessary to support the federal claim were before the state courts," *Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982), and "mere similarity of claims is insufficient to exhaust." *Duncan v. Henry,* 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995).

In this case, our review of the state court record reveals that the arguments that Bronshtein made with respect to these issues were based entirely on state, rather than federal, law.[12] As a result, these claims were not properly exhausted. *See Keller v. Larkins,* 251 F.3d 408, 413-15 (3d Cir.2001).

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12. *See* Appellant's Br. at 14-20, 27-29, 32-37, *Commonwealth v. Bronshtein,* 88 Capital Appeal Docket, Pa. Sup.Ct., Eastern District.

Bronshtein contends, however, that these claims "were automatically exhausted on direct appeal by virtue of the Pennsylvania Supreme Court's mandatory appellate review in capital cases." Reply And Mem. Of Law In Support Of Pet. For Writ Of Habeas Corpus at 11. Under 42 Pa. Cons.Stat. § 9711(h)(3)(i), the Pennsylvania Supreme Court is required to review the record in capital cases to determine whether "the sentence of death was the product of passion, prejudice or any other arbitrary factor[.]" Such review, Bronshtein asserts, "satisfies the exhaustion requirement for all record-based claims of constitutional error." Reply And Mem. Of Law In Support Of Pet. For Writ Of Habeas Corpus at 15. The District Court agreed, stating that "[e]ven when a petitioner fails to raise a particular constitutional issue, the mandatory review of capital convictions and sentencings required in Pennsylvania is sufficient to exhaust fundamental constitutional claims of the kind raised here by Bronshtein." App. I at 22 n.19.

We must disagree with this analysis. First, neither 42 Pa. Cons.Stat. § 9711(h)(3)(i) nor any other Pennsylvania statute states that the Pennsylvania Supreme Court is expected to try to identify and then assess every "record-based" federal constitutional argument that might possibly be made on behalf a capital defendant. Instead, 42 Pa. Cons.Stat. § 9711(h)(3)(i) imposes a much more limited, albeit important, obligation, i.e., to make sure that no death sentence is "the product of passion, prejudice or any other arbitrary factor."

Second, we see no evidence that the Pennsylvania Supreme Court believes that it is required to engage in, or

that it in fact engages in, the sort of boundless inquiry that Bronshtein thinks is required. *See Commonwealth v. Paolello,* 542 Pa. 47, 665 A.2d 439, 454 n. 12 (1995) ("[W]e decline counsel's invitation to scour the record for additional errors caused by counsel and *sua sponte* raise said issues; the request is inappropriate and nonsensical in that such advocacy would be beyond the scope of our appellate review.") The state supreme court's opinion on direct appeal in this case is illustrative. The state supreme court did not address any federal constitutional issue that Bronshtein did not raise; nor did the state supreme court address the question whether Bronshtein's state-law arguments would have merit if recast in federal constitutional terms. It seems fanciful to suggest that, in every capital appeal, the state supreme court actually considers and rejects a host of federal constitutional claims without receiving briefing or argument on those claims from counsel and without even mentioning in the opinion of the court that the claims were entertained.

Third, Bronshtein's argument is inconsistent with Pennsylvania's scheme of post-conviction review. Under the PCRA, a petitioner may not obtain relief on a claim that was "previously litigated," 42 Pa. Cons.Stat. Ann. § 9543(a)(3), and a claim is viewed as having been "previously litigated" if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa. Cons.Stat. Ann. § 9544. Thus, if a Pennsylvania Supreme Court decision affirming a capital conviction and sentence on direct review is deemed to signify that the Court considered and rejected every possible federal constitutional argument that could be made based on the record, it would follow that no such claims could ever be

asserted under the PCRA. *See Holland v. Horn*, 150 F.Supp.2d 706, 720-21 (E.D.Pa.2001); *Banks v. Horn*, 49 F.Supp.2d 400, 406-07 (M.D.Pa.1999). We are convinced that the Pennsylvania Legislature did not intend such a result.

Fourth, Bronshtein's argument would frustrate important aspects of the federal habeas scheme. Under the federal habeas statute, an applicant for federal habeas relief must show that "*the applicant* has exhausted" all available state remedies. 28 U.S.C. § 2254(b)(1)(A) (emphasis added). In addition, a state is not "deemed to have waived the exhaustion requirement" unless it "expressly" does so, 28 U.S.C. § 2254(b)(3), and a federal habeas court's scope of review varies greatly depending on whether a particular claim was or was not "adjudicated on the merits" in the state courts. *See* 28 U.S.C. § 2254(d). Under Bronshtein's argument, however, the fiction that the state supreme court on direct review automatically considers all possible "record-based" arguments (and tacitly rejects all those that it does not expressly endorse) essentially does away with these aspects of the federal habeas scheme. The exhaustion requirement is rendered meaningless since all possible claims are deemed to be exhausted on direct review. Moreover, because an affirmance on direct review is deemed to constitute an adjudication on the merits of all possible record-based claims, it would seem to follow that all such claims are subject to the narrow scope of federal habeas review set out in 28 U.S.C. § 2254(d) regardless of whether the state supreme court in fact ever considered those claims.

For these reasons, we agree with the courts of appeals that have rejected arguments similar to Bronshtein's.

See, e.g., Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir.2002); *Smith v. Moore,* 137 F.3d 808, 821 (4th Cir.1998); *Nave v. Delo,* 62 F.3d 1024, 1039 (8th Cir.1995); *Julius v. Johnson,* 840 F.2d 1533, 1546 (11th Cir.1988). We have considered the Ninth Circuit's decision in *Beam v. Paskett,* 3 F.3d 1301, 1305-07 (9th Cir.1993), but that decision does not persuade us to accept Bronshtein's argument here.

In *Beam,* the claim at issue concerned the constitutionality of an aggravating factor set out in the Idaho capital sentencing statute. After first concluding that the habeas petitioner had fairly presented his federal claim to the Idaho Supreme Court, the *Beam* panel stated that the claim would not be procedurally defaulted even if the petitioner had not raised it in the state supreme court. The *Beam* panel noted that the Idaho Supreme Court was required by statute to review the entire record in a capital case to make sure that the death sentence was not the result of an "arbitrary factor." *Id.* at 1306. The panel then predicted that the Idaho Supreme Court would interpret the state statute to mean that "affirmance of a capital sentence constitutes an implicit rejection of all specific claims falling within the subject of its mandatory review authority and that any claim covered by the mandatory review statute must be deemed resolved against the defendant even if he did not raise that claim before the court and even if the court failed to address it in its opinion." *Id.* at 1306. Reasoning that reliance on the sentencing factor at issue "would clearly constitute reliance on an arbitrary factor," the *Beam* panel concluded that this claim fell within the specific terms of the Idaho Supreme Court's mandatory review authority and that therefore the state supreme court must have considered and rejected the claim. *Id.* at 1307.

Beam is distinguishable from the present case on several grounds. First, as noted, the petitio.. : there was held to have fairly presented his claim to the state supreme court. Second, the relevant discussion in *Beam* was based on a prediction about how the Idaho Supreme Court would interpret its mandatory review authority, and we do not predict that the Pennsylvania Supreme Court would interpret its mandatory review authority in a similar fashion. Third, the relevant discussion in *Beam* was also predicated on the Court's view that the particular claim at issue, the constitutionality of a capital sentencing factor, fell within the list of specific questions that the Idaho Supreme Court was obligated to consider on direct review. The pertinent claims here are different, and even if we were bound by *Beam*—and of course we are not—it would not follow that the particular claims in question here fall within the scope of the Pennsylvania mandatory review provision. However, to the extent that *Beam* 's reasoning differs from our analysis of Bronshtein's argument here, we find *Beam* unpersuasive. We thus hold that the claims under discussion were not properly exhausted.

Although Bronshtein has never properly exhausted the claims at issue, he is now "clearly foreclosed" from doing so by the PCRA time limit, *see* 42 Pa. Cons.Stat. Ann. § 9545(b), and these claims are therefore procedurally defaulted. *See Whitney,* 280 F.3d at 250-52. As a result, we may not grant relief on those claims unless Bronshtein "makes the standard showing of cause and prejudice or establishes a fundamental miscarriage of justice." *Id.* at 253 (citation and internal quotation marks omitted).

We would permit Bronshtein to attempt on remand to establish a reason to excuse his procedural default, but we find it unnecessary to do so because it is apparent that the claims in question lack merit. Under 28 U.S.C. § 2254(b)(2), we may reject claims on the merits even though they were not properly exhausted, and we take that approach here. We will discuss in turn the two evidentiary rulings that Bronshtein contests.

B.

1. *Hart's testimony.* In his proffer of Hart's testimony at an *in camera* hearing before the trial judge, defense counsel stated that Hart would testify that he had been hired by the New Jersey Jewelers' Association to conduct an investigation into a "scam" that Karlitsky was suspected of carrying out. App. V at 1376-77. According to the proffer, Hart would have testified that jewelry that had been reported as stolen from Karlitsky's store had "ended up" at a downtown Philadelphia store owned by Karlitsky's cousin. *Id.* In addition, it was proffered that Hart would have testified that, "contrary to . . . the Commonwealth's testimony," the Philadelphia Police Department was involved in the investigation of this matter. *Id.* Defense counsel asserted that Hart's testimony would support the theory that Karlitsky gave some of the jewelry from a scam at the Leo Mall to Gutman to sell at his store and that a dispute between them motivated Karlitsky to kill Gutman. *See id.* at 1341-42.

Defense counsel acknowledged, however, that Karlitsky was never charged or arrested in connection with the Leo Mall robbery "because they couldn't get enough evidence

to arrest him." *Id.* at 1377. Furthermore, defense counsel conceded that much of Hart's proffered testimony was hearsay and that the only proper testimony that Hart could have given was that he was "working with the Philadelphia Police in an investigation of Karlitsky." *Id.* at 1377-80. *See also Commonwealth v. Bronshtein,* 691 A.2d at 917 n. 18. The trial court excluded this testimony on the ground that evidence about the Leo Mall robbery was "entirely collateral to the proceedings," and the state supreme court held that this ruling was not an abuse of discretion because Bronshtein "failed to offer any evidence that there was any logical connection between the Slobotkin and Gutman murders and this dissimilar case." *Bronshtein,* 691 A.2d at 917.

"A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Here, the trial court apparently applied a familiar evidence rule allowing the exclusion of evidence if its probative value is outweighed by the danger of confusion of the issues or needless presentation of cumulative evidence. *See Morrison v. Commonwealth, Dept. Of Pub. Welfare,* 538 Pa. 122, 646 A.2d 565 (1994); *Commonwealth v. Boyle,* 498 Pa. 486, 447 A.2d 250 (1982); Pa. Rule of Evid. 403 (effective 1998). The trial court's ruling plainly did not rise to the level of a federal constitutional violation.

To begin, Hart's proffered testimony would have been largely cumulative since evidence about the Leo Mall robbery had already been admitted. Montgomery County Detective

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Donald H. Rohner had testified that, according to an unnamed source (who, unbeknownst to the jury, was Bronshtein himself), Karlitsky was a suspect in the alleged robbery of his own store. Indeed, in an important respect, Rohner's testimony was actually more helpful to the defense than Hart's would have been. Although Hart could not have given competent testimony supporting the defense theory that some of the jewelry from the Leo Mall robbery had found its way to Gutman's store, Rohner testified that, according to his source, jewelry from the Leo Mall robbery had "ended up somewhere else, at least one or more other places[.]" App. IV at 898.[13]

Moreover, even if Hart's testimony had not been largely cumulative, it would have had little probative value. At best, Hart's testimony suggested that Karlitsky might have staged the robbery of his own store. This fact alone sheds no light on the identity of Gutman's killer. Even if Hart's testimony is viewed in conjunction with Detective Rohner's statement that some of the jewelry from the Leo Mall store "ended up" in other places, the evidence does little to show that one of those places was Gutman's store, much less that a dispute over this jewelry led Karlitsky to kill Gutman. This limited probative value must be weighed against the likely danger

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13. It appears that Hart's testimony would have supplemented Rohner's in only one respect. While Rohner testified that Karlitsky was a suspect in the Leo Mall robbery, he stated that he did not receive any information that the Philadelphia police considered him a suspect, and Hart would have testified that the Philadelphia police did suspect Karlitsky. This additional feature of Hart's proffered testimony is far too slight to convince us that the trial court's ruling violated Bronshtein's federal constitutional rights.

that the evidence would sidetrack the proceedings and confuse the jury. By admitting Hart's testimony, the court risked submerging the defendant's trial in collateral litigation over an unsolved and (at most) tangentially related crime committed by someone other than the accused. For these reasons, the trial judge's decision to exclude Hart's proffered testimony did not violate Bronshtein's federal constitutional rights.

2. *Confession to Slobotkin murder.* As previously noted, Bronshtein confessed to the Philadelphia police that he had killed Slobotkin, but when Bronshtein was questioned by the Montgomery County police about the Gutman murder he told them that Slobotkin and Gutman had been killed by the same man, namely, "Mr. X," whom Bronshtein later identified as Karlitsky. Bronshtein also said that he was afraid of Mr. X and that he had previously confessed to the Slobotkin murder only because he would have "walked out of [the police station] a dead man" if he had not confessed. App. IV at 965-66.

The trial judge admitted evidence of Bronshtein's confession to the Slobotkin murder but instructed the jury that it was permitted to consider this evidence solely in relation to Bronshtein's statement that the person who killed Slobotkin also killed Gutman. When the evidence was admitted, the trial court told the jury:

> This evidence [Bronshtein's confession that he killed Slobotkin] is not to be considered by you to the extent that one might conclude, well, if he did do this other crime for which we're not trying,

> then, he's a bad person, and that means he probably did this. No, it can't be used for that purpose. It comes in for a very limited and specific purpose, which is to say that if you believe that he made this statement, and if you believe that it was true, and if you believe that he made the other statement that has been entered into evidence [that the same person who killed Slobotkin also killed Gutman], and if you believe that is true, then, all of that may be considered by you as evidence as to the identity of the person who did, in fact, kill Mr. Gutman, the decedent who is the subject of this case. But it is for that specific and limited purpose only that you are being permitted to hear this.

Id. at 1090-91. In its final charge, the trial court gave a similar warning.[14]

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14. The trial judge stated:

> [Y]ou've heard evidence tending to prove that the defendant was guilty of an offense for which he is not on trial, and I am speaking again of the testimony to the effect that the defendant made a statement to Detective Augustine that he had killed a jeweler named Slobotkin. This evidence, as I instructed you at the time you first heard it, was before you for a limited purpose, that is, for the purpose of tending to show the identity of the killer in this, the Gutman case, and then only because the Commonwealth has put before you another statement allegedly from the defendant that the killer of Slobotkin and the killer of Gutman were one and the same man.

(Cont'd)

Appendix A

Admission of "other crimes" evidence provides a ground for federal habeas relief only if "the evidence's probative value is so conspicuously outweighed by its inflammatory content, so as to violate a defendant's constitutional right to a fair trial." *Lesko v. Owens*, 881 F.2d 44, 52 (3d Cir.1989). That is plainly not the case here.

Other crimes evidence is routinely admitted when it is relevant[15] to show "identity." *See, e.g.*, Fed.R.Evid. 404(b);

(Cont'd)

> In other words, you were allowed to hear about the statement allegedly attributed to the defendant on a case unrelated to this one only because if coupled with the other statement attributed to him and if believed by you, then, it goes to the question of the identity of the killer of Mr. Gutman, which is the issue in this case.
>
> Now, this evidence must not be considered by you in any way other than for the purpose I just stated. You must not regard this evidence, that is, the statement about killing Slobotkin, as showing that the defendant is a person of bad character or criminal tendencies from which you might be inclined to infer his guilt. If you find the defendant guilty, it must be because you are convinced by the evidence that he committed the crime in this case, the one charged, not because you believe he's wicked or has committed other offenses in other places at other times.

App. V, Pt. 2 at 1676-77.

15. In this context, "relevant" means sufficient to support a finding that the other crime or wrong occurred and that the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

Pa. R. Evid. 404(b)(2). Here, Bronshtein's confession to the Philadelphia police that he killed Slobotkin was relevant to show the identity of Gutman's killer because Bronshtein later informed the Montgomery County police that Slobotkin's killer also murdered Gutman. Bronshtein's confession to the Slobotkin murder was not rendered irrelevant by his subsequent contradictory statement to the Montgomery County police that Karlitsky killed Slobotkin, as well as Gutman. Relevant evidence does not become irrelevant just because contradictory evidence exists. Conflicting evidence presents a question of credibility for the trier of fact, not a question of relevance for the court, and of course a trier of fact is under no obligation to accept or reject a party's admissions in toto. On the contrary, a trier of fact may believe some of the party's admissions and disbelieve others. Here, Bronshtein's statement that he killed Slobotkin and his statement to the Montgomery County police that Karlitsky was the killer were both relevant to show the identity of Gutman's murderer, and it was proper for the trial judge to admit both statements.

VII.

Bronshtein's final argument concerns comments made by the prosecutor in his guilt phase summation. In short, the prosecutor argued that, although Bronshtein's attorney had suggested that Karlitsky was a major organized crime figure and that Karlitsky had killed Gutman, the defense had not offered any significant evidence to support this theory.

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According to the prosecutor, even the Leo Mall evidence was weak.[16]

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16. The prosecutor stated:

> And I suggest to you they would search high and low, heaven and hell, to try and get somebody in this courtroom, expert or otherwise, that can put Karlitsky somehow related to some scam—
>
> . . . .
>
> They would be more than happy to find somebody that would come in here and link [Karlitsky] to some scam, link him to some involvement of the mob.
>
> Ask their own so-called expert, the man they're putting forth as the expert, "Have you ever heard of Karlitsky?"
>
> . . . .
>
> Did you hear that question even posed to their expert? Did you hear he heard him [Karlitsky] involved in anything?
>
> What is this, what he has labeled, Nicky Scarfo-like head? What's his criminal background? No robberies, like he said. No murders, like he said. Big Nicky Scarfo, Daddy Warbucks Scarfo, headed this Russian Mafia, Russian Mob, has a shoplifting arrest from 1990. That's where they got his fingerprints from, a shoplifting arrest. No other criminal history, nothing with robberies, nothing with murders[.] . . . That's a smoke screen, ladies and gentlemen, you can conclude based on the evidence that's been presented to you.

(Cont'd)

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(Cont'd)

That's something where they're trying to take your focus off the ball, trying to get your attention deflected off of what you can conclude based on the law and the evidence is the real truth in this case.

They want you to believe a Karlitsky. They have to have you believe a Karlitsky if their defense is going to apply, if their defense is going to work.

But nobody has heard of him. Organized crime hasn't heard of him. He's not linked to any scams, not linked to any organized crime—

. . . .

Nothing. No links whatsoever that have been brought forward in this case no matter how many times he wants to object, but that's still the way it is. And that's still the facts in this case.

The only thing they even alluded to—and I suggest to you, they didn't even give you the whole picture—was they alluded to some Leo Mall store he had as a jeweler. He starts talking about this consignment stuff.

You haven't heard one word about any consignment from Leo Mall. You haven't heard word one about his involvement in any scam from Philadelphia Police involved in the Leo Mall, not one iota about that; but they bring it forth and they argue it to you when they come here in closing to try and say, "Well, we'll infer he was involved in a scam here; so we'll take that and infer through our expert that Russian Jews are involved

(Cont'd)

Bronshtein claims that the prosecutor's statements violated his due process righ :. He contends that the comments on the defense's failure to present evidence in support of the defense theory were improper because the prosecutor knew that, but for the trial court's preclusion of Hart's testimony, the defense would have presented "evidence that Karlitsky had previously committed jewelry robberies and scams in support of the defense theory that Karlitsky . . . held the intent, motive and means for committing the instant offenses." Bronshtein's Br. at 104.

Improper remarks by a prosecutor may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Due process is violated where the misconduct "constitutes a 'failure to observe that fundamental fairness essential to the very

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(Cont'd)

> in scams and a lot of organized crime. From that, they do scams, and so we'll link him from maybe being in a scam, from being a Russian Jew to maybe working in scams they do. Wah-la. He's organized crime."
>
> Think of the step that takes. Think of the leaps they take when they try and take that to you and whether it's founded in any of the evidence that has been presented to you. Think of that, because that's the linchpin of their defense; because if this fear is dispelled, if this Karlitsky does not exist in terms of doing anything in this case, then, their defense goes down the tubes.

App. V, Pt. 2 at 1585-88.

concept of justice.'" *Id.* at 642, 94 S.Ct. 1868. No such violation occurred here.

In discussing the prosecutor's comments, the Pennsylvania Supreme Court accurately noted that the defense had not proffered any evidence that Karlitsky had staged the robbery of his own store, only evidence that the police suspected him of involvement. *See Bronshtein,* 691 A.2d at 920. Moreover, there was no evidence linking Karlitsky to "the Russian 'mafia.'" *Id.* The Pennsylvania Supreme Court observed:

> [A] review of the transcript of an *in camera* discussion reveals that, although appellant's expert had personally investigated the possibility of Karlitsky's involvement in an alleged scam at the Leo Mall jewelry store, there had been no evidence to link Karlitsky to any such scam or to link any jewelry scam to the Gutman murder ....
>
> Trial counsel dedicated more than half of his sixty page closing argument to the theory that Karlitsky had committed the murder as part of a jewelry store scam involving the Russian "mafia," and that appellant had confessed to the Slobotkin murder out of fear of Karlitsky. Given that there was no evidence, either at trial or in the defense proffer on the substance of the excluded testimony, of Karlitsky's involvement in an alleged scam at the store or his connection to the Russian "mafia,"

> it was not improper for the prosecution to ask the jury to draw an inference that no such evidence existed.

Id.

We agree with the state supreme court's analysis of this issue and hold that the summation did not violate Bronshtein's federal constitutional rights.

VIII.

For the reasons set out above, we reverse the order of the District Court in part and affirm in part, and we remand for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED AUGUST 16, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
THIS IS A CAPITAL CASE

No. 99-2186

ANTUAN BRONSHTEIN,

Petitioner,

v.

MARTIN HORN, Commissioner Designate, Pennsylvania Department of Corrections,

Respondent.

Reed, S.J. **August 16, 2001**

MEMORANDUM

Now before the Court is the motion of petitioner Antuan Bronshtein to alter or amend the judgment of July 5, 2001 (Document No. 26), and the response of the Commonwealth of Pennsylvania thereto. For the reasons set forth below, the motion will be denied.

Appendix B

This Court issued a memorandum and order on July 5, 2001, in which it considered the petition of Bronshtein for habeas relief under 28 U.S.C. § 2254. *See Bronshtein v. Horn*, No. 99-2186, 2001 U.S. Dist. LEXIS 9310 (E.D.Pa. July 5, 2001). The Court concluded that petitioner was entitled to relief on three of the grounds set forth in the petition. Despite having substantially prevailed on the petition and having his death sentence vacated, petitioner has filed a motion challenging the July 5 decision. In a footnote to the memorandum, the Court observed, "Petitioner does not argue that his convictions for robbery, theft, and conspiracy were constitutionally flawed." *Id.* at *80 n.35. Petitioner now argues on the instant motion that that footnote was inaccurate, and that the Court overlooked a number of claims for relief that challenged the robbery, theft, and conspiracy convictions. Petitioner points to Claims IV, V, VI, and VII.[1]

A review of the arguments submitted by petitioner in support of Claims IV, V, and VI belies his assertion that these claims challenged anything other than the murder conviction. Petitioner's voluminous and carefully crafted submissions on these claims can only be read to challenge the murder conviction. Claim IV asserts that the trial court erred in

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1. Under Rule 59(e), a party must rely on one of three grounds to alter or amend a judgment: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued the earlier order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice," *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999); *see also, e.g., Nissim v. McNeil Consumer Products Co., Inc.*, 957 F.Supp. 600, 601 (E.D.Pa.), *aff'd*, 135 F.3d 765 (3d Cir.1997) (table); *Smith v. City of Chester*, 155 F.R.D. 95, 96-97 (E.D.Pa.1994).

precluding evidence that someone else committed the murder and focuses its discussion on evidence showing that another individual was the "actual murderer." *See* Petition, at 22-23. Claim V challenges the admission of petitioner's involvement in another homicide for the purpose of showing identity, and again focused its discussion on the murder conviction. *See* Petition, at 23. ("the prosecution asked the jury to conclude that Petitioner's admission to that police department regarding the Philadelphia murder meant that Petitioner must be guilty of this one"). Claim VI asks solely that petitioner's death sentence be vacated because of prosecutorial misconduct during the sentencing stage. *See* Petition, at 24. To read these claims to challenge the robbery, theft, or conspiracy conviction requires an act of creative interpretation that is both unwarranted and impermissible.

Claim VII is a constitutional challenge to the Commonwealth's use of a peremptory strike against a potential juror of purported Russian-Jewish ancestry in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). While petitioner's discussion of that claim includes no mention of the robbery, theft, or conspiracy convictions, of course, the allegation infects everything the jury did, and thus necessarily encompasses the robbery, theft, and conspiracy convictions the jury handed down. Thus, I must address petitioner's *Batson* claim in some detail.

A *Batson* inquiry mimics the burden-shifting framework applied by federal courts in Title VII cases: first, a criminal defendant must set forth a *prima facie* case of discriminatory use of a peremptory challenge; then the burden shifts to the

Commonwealth to articulate legitimate, non-discriminatory reasons for the challenge; and finally the court must determine whether the prosecutor's explanation is pretextual and whether the defendant has met his burden of proving purposeful discrimination. *See Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (citing *Batson*, 476 U.S. at 96-98).

A *prima facie* case is established when a defendant shows membership in a cognizable racial group and that the prosecutor has used peremptory challenges to remove individuals of that race from the jury panel. *See United States v. Clemons*, 843 F.2d 741, 745 (3d Cir.1988) (citing Batson, 476 U.S. at 94-95). A court may consider all relevant circumstances in assessing the defendant's *prima facie* showing, including (1) the fact that peremptory challenges permit a prosecutor predisposed to discriminate to do so (2) any other pattern of discriminatory conduct; and (3) any prosecutorial statements. *See id.*

The Commonwealth does not dispute that the petitioner in this case is a Russian-Jew and that the Commonwealth used one of its peremptory strikes to disqualify the only Russian-Jewish juror.[2] When defense counsel objected to the use of the peremptory challenge on *Batson* grounds, the trial court denied the objection outright:

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2. The prosecutor put petitioner's Russian-Jewish heritage on the record during *voir dire*. (Trial Transcript, April 5, 1994, at 168-69.) In fact, the petitioner is Moldavian, not Russian, but the Commonwealth does not argue this point and I find it unnecessary to address it.

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MR. MCMAHON: Your Honor, I would make my *Batson* challenge now.

COURT: What, on her?

MR. MCMAHON: She's of Russian-Jewish heritage.

COURT: You can make it and I'll deny it. That's Commonwealth peremptory 5.

(Trial Transcript, April 5, 1994, at 175-76.) The trial court never provided the Commonwealth an opportunity to explain the use of its peremptory challenge.

While not explicit from the transcript, it appears that the trial court ruled that petitioner's counsel had not made the *prima facie* showing of discriminatory use of a peremptory challenge required by *Batson*. Clues to the basis of the denial lie in a discussion that took place just prior to the striking of the juror at issue, after petitioner's counsel had asked another juror if she was Jewish.

MR. MCMAHON: The only inquiry that I'm interested in would be for the possible *Batson* issues, it's whether the juror was of the same Jewish heritage as Mr. Bronshtein, the Defendant. Beyond that, I'm not particularly interested.

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THE COURT: I don't think that's a *Batson* issue. . . . Nationality as defined, has to do with where you are from and where you live. You're talking in theological terms, to make it a race issue. I understand what you're saying, but it's not a nationality, as you're using that term. . . .

I think we are far afield, and we are wasting time. I threw out to you this— I can easily handle *Batson.* It's not a *Batson* issue, and I'll rule without worrying about being wrong on that.

(Trial Transcript, April 5, 1994, at 151, 154.) While the Supreme Court of the United States has not expressly ruled on this issue to this date, it is likely that the trial judge was wrong on the issue of whether Jews were a cognizable group under *Batson.* The Supreme Court has held that Jews may be classified as a "race" as a matter of federal statutory and constitutional law. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987) (Jews could bring claim of racial discrimination on claim brought under 42 U.S.C. § 1982). While the Supreme Court has not expressly extended *Batson* to claims of religious discrimination in jury selection, *Batson* has been extended beyond its initial "racial" confines to include sex, *J.E.B. v. Alabama*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and there is support for the contention that *Batson* does

indeed prevent a prosecutor from striking a juror based on her religion. *See, e.g., United States v. Somerstien*, 959 F.Supp. 592, 595 (E.D.N.Y.1997) (citing *Davis v. Minnesota*, 511 U.S. 115, 114 S.Ct. 2120, 128 L.Ed.2d 679 (1994) (Thomas, J., dissenting) (objection to denial of certiorari)).

Moreover, the trial court's comments in this case implicated only the religion of a Jew, and did not specifically address the question of Russian heritage. There is no question that *Batson* applies to discrimination on the basis of national origin and ethnicity, *see J.E.B.*, 476 U.S. at 146; *Pemberthy v. Beyer*, 19 F.3d 857, 859 (3d Cir.1994), and thus, petitioner's claim could have been based on his Russian heritage alone. While it appears that the trial court may have erred to the extent that it concluded that Russians and/or Jews were not a cognizable group under *Batson*, it was presented with a confusing explanation of the defense position by defense counsel and thus the record is far from clear as to precisely the basis for the challenge. Whether petitioner was relying on his Russian or Jewish heritage alone, or some amalgam of the two, I will consider his claim under *Batson*.

While the decision of the Supreme Court of Pennsylvania on the *Batson* issue is not determinative of the challenge presented to this Court, I believe it is worthy of analysis, lest there by any doubt about its efficacy. On direct appeal, the Supreme Court of Pennsylvania affirmed, avoiding the question of whether Russian-Jews were protected under *Batson* and instead holding that (1) petitioner had failed to establish a *prima facie* case of discriminatory use of a peremptory challenge and (2) the "record reveal[ed]" neutral, non-discriminatory reasons for excluding the juror at issue.

Appendix B

See Commonwealth v. Bronshtein, 547 Pa. 467, 477, 691 A.2d 907 (1997). The second ground relied upon by the Supreme Court of Pennsylvania in affirming the trial court's *Batson* decision, I believe, is invalid. It is not precedented jurisprudence for an appellate court to, *ex post facto*, supply possible or likely reasons for the use of a peremptory challenge. *Batson* requires the prosecutor to reveal her *actual* reasons for striking a juror. Where the prosecutor has not done so, whether on her own initiative or because of the trial court's ruling, an appellate or habeas court should not later divine reasons that might have motivated the prosecutor, however tempting that may be, and regardless of how abundant or logical the possible reasons may seem. *See Hardcastle v. Horn*, No. 98-3028, 2001 U.S. Dist. LEXIS 8556, at *31-37 (E.D. Pa. June 27, 2001) ("Given *Batson*'s emphasis on the prosecutor's intent, reliance on apparent or potential reasons is objectively unreasonable because they do not shed any light on the prosecutor's intent or state of mind when making the challenge."); *see also Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir.1998) (where trial judge had prevented prosecutor from articulating neutral reasons at trial, state could not on appeal rely on "apparent" reasons in record to defend against a *Batson* claim).

Because the trial court in this case stopped the *Batson* inquiry at the *prima facie* stage, petitioner's *Batson* claim stands or falls on whether he established a *prima facie* case of discriminatory exclusion. *See Mahaffey*, 162 F.3d at 484 ("Because the trial judge never reviewed the actual reasons for the challenges . . . we are limited on appeal to determining whether the *prima facie* showing was met."). The only record evidence petitioner pointed to at trial, and the only evidence

petitioner relies upon now in pressing his *Batson* claim, is the undisputed fact that the prosecutor used a peremptory challenge to exclude from the jury the only person in the *venire* who shared petitioner's Russian-Jewish ancestry. Petitioner does not proffer any other relevant evidence to support his *Batson* claim.

Thus, this Court must decide whether the exclusion of the only member of a defendant's racial or ethnic group from the jury pool is alone sufficient to establish a *prima facie Batson* challenge. The Court of Appeals for the Third Circuit has yet to rule on this issue. However, these are not completely uncharted waters; two courts of appeals have addressed this very question. The Court of Appeals for the Ninth Circuit has held that the fact that an excluded juror was the only member of defendant's group "does not, in itself, raise an inference of discrimination. . . . More is required." *See Wade v. Terhune*, 202 F.3d 1190 (9th Cir.2000) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir.1994)). On the other hand, the Court of Appeals for the Tenth Circuit has concluded that striking the only juror that shares the defendant's race suffices to establish a *prima facie* claim under *Batson*. *See United States v. Joe*, 8 F.3d 1488, 1499 (10th Cir. 1993) (citing *United States v. Chalan*, 812 F.3d 1302, 1313-1314 (10th Cir.1987)).

I find that the Court of Appeals for the Ninth Circuit has it right, and conclude today that the bare fact that the only Russian Jew was excluded from petitioner's jury in this case does not make out a *prima facie Batson* claim. Something more is required here. I need not and do not suggest a minimum threshold of record evidence required to establish

a *prima facie Batson* claim, and there being no binding authority to do so, I conclude that the evidence that petitioner produced here is not enough. The record indicates that it was petitioner's counsel, not the prosecutor, who asked two jurors whether they were Jewish. (Trial Transcript, April 5, 1994, at 148-49, 170-71.) Nothing in the record indicates that the prosecutor was interested in whether the jurors shared a common ethnic heritage with the defendant. The prosecutor suspected the juror at issue on petitioner's *Batson* claim was Quaker because she attended a Quaker school, and the prosecutor inquired into her religion out of a concern that the juror was morally or religiously opposed to the death penalty. (*Id.* at 155.) That juror did not identify her religion in response to the prosecutor's question, and only revealed that she was Russian-Jewish in response to a question by petitioner's counsel. (*Id.* at 168-69.) Such a record leaves a muddy footprint indeed. To find that the petitioner has raised a permissible inference that the prosecutor used a peremptory challenge for proscribed discriminatory reasons would require an exercise in speculation that this Court is neither inclined nor authorized to perform.

Finally, I note my disagreement with the Supreme Court of Pennsylvania's conclusion in this case that *Batson* requires a defendant must produce evidence of the race of all venirepersons struck by the prosecutor, the race of prospective jurors stricken by the defense, and the racial makeup of the final jury selected. I read *Batson* to be far less exacting in its evidentiary requirements, and believe that there are many evidentiary avenues a petitioner may travel to bolster his *Batson* claims. However, I do not believe it necessary to articulate all of them here, and limit my

conclusion to this record. Therefore, while not accepting the reasoning of the trial court or the Supreme Court of Pennsylvania, for the reasons stated above, I find no constitutional error in the trial court's denial of petitioner's *Batson* claim. Therefore, the motion to alter or amend judgment will be denied.

An appropriate Order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
THIS IS A CAPITAL CASE

No. 99-2186

ANTUAN BRONSHTEIN,

Petitioner,

v.

MARTIN HORN, Commissioner Designate,
Pennsylvania Department of Corrections,

Respondent.

ORDER

AND NOW, this 16th day of August, 2001, upon consideration of the motion of petitioner Antuan Bronshtein to alter or amend the judgment of July 5, 2001 under Rule 59(e) of the Federal Rules of Civil Procedure (Document No. 26), and the response of the Commonwealth of Pennsylvania thereto, and having determined, for the reasons set forth in the foregoing memorandum, that there has been no intervening change in law or newly discovered evidence, and having found no error of law or fact in the result reached by this Court in its July 5, 2001, memorandum and order,

and having concluded that petitioner is therefore not entitled to relief under Rule 59(e), **IT IS HEREBY ORDERED** that the motion of petitioner is **DENIED**.

s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., S.J.

APPENDIX C — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JULY 5, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

THIS IS A CAPITAL CASE

NO. 99-2186

ANTUAN BRONSHTEIN,

Petitioner,

v.

MARTIN HORN, Commissioner Designate,
Pennsylvania Department of Corrections,

Respondent.

Reed, S.J. July 5, 2001

MEMORANDUM

Antuan Bronshtein was convicted of first degree murder and sentenced to death in state court, and now seeks habeas relief under 28 U.S.C. § 2554. The Commonwealth of Pennsylvania contends that Bronshtein's failure to comply with a state procedural rule bars this Court from hearing the

merits of his habeas petition. Having carefully considered the arguments of both parties, the record of the trial proceedings,[1] and relevant precedent, I conclude, for the reasons explained herein, that Bronshtein's habeas claims are not procedurally defaulted, because the procedural rule that the Supreme Court of Pennsylvania relied upon in rejecting his claims was not clearly established or regularly followed at the time of his alleged default, therefore was not sufficiently "adequate" to bar federal habeas review. For that reason, this Court may consider the merits of his petition. Upon a review of the merits of Bronshtein's claims, I find that he is entitled to relief on three of his claims, and will grant the writ unless he is given a new trial and sentencing.

Factual Background

On January 11, 1991, Alexander Gutman was found dead in his jewelry store in the King of Prussia Shopping Center. Gutman had been shot twice in the face, and approximately $60,000 in jewelry were discovered missing from the store. In May 1991, Antuan Bronshtein, who was in custody in connection with another crime, volunteered information about the Gutman murder, telling authorities that the murder had been committed by a "Mr. X," a member of the Russian mafia.

This revelation made Bronshtein a prime suspect, and in 1994, he stood trial for Gutman's murder, as well as robbery and theft. The evidence presented at trial indicated

1. This Court has, with the cooperation of the Court of Common Pleas of Montgomery County, obtained and reviewed a copy of the entire trial record in this case.

that the murder weapon was a gun owned and kept in the store by the victim, however that weapon was never recovered. Bronshtein's prints were found in the jewelry store, and eyewitness testimony placed Bronshtein and another man at the store hours before Gutman's body was discovered. A former associate of Bronshtein's testified that Bronshtein had said that he had killed a person in a jewelry store "out past the boulevard" and had taken his jewelry.

Bronshtein's defense theory was that the murder was actually committed by a man referred to during the trial as Mr. X or Adik Karlitsky. The defense relied primarily on evidence linking a piece of a gun found at the jewelry store to Karlitsky, Bronshtein's prior statements that Karlitsky had committed the murder, and eyewitness testimony placing Karlitsky at the jewelry store on the day of the murder.

Procedural Background

At the close of the trial, the jury convicted Bronshtein of first degree murder, robbery, theft of movable property, possession of an instrument of crime, and criminal conspiracy to commit murder. At the sentencing phase, the jury found two statutory aggravating circumstances—that Bronshtein had committed the killing during the perpetration of a felony and that he had a significant history of felony convictions involving the use or threat of violence—and three statutory mitigating circumstances—that Bronshtein suffered from extreme mental or emotional disturbance, that he had a poor childhood and upbringing, and that there was a possibility that he did not actually pull the trigger. The jury returned a sentence of death.

Appendix C

The Supreme Court of Pennsylvania affirmed Bronshtein's conviction and sentence on direct appeal. *See Commonwealth v. Bronshtein,* 547 Pa. 460, 691 A.2d 907 (1997). The governor of Pennsylvania signed a warrant of execution, which was stayed by the Supreme Court of Pennsylvania when Bronshtein petitioned the Supreme Court of the United States for a writ of *certiorari. See Commonwealth v. Bronshtein,* 548 Pa. 520, 698 A.2d 589 (1997). That petition was denied, *see Bronshtein v. Pennsylvania,* 522 U.S. 936, 118 S.Ct. 346, 139 L.Ed.2d 269 (1997), and another warrant of execution issued.

Petitioner then filed his first petition under the Pennsylvania Post-Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.* ("PCRA"), on December 3, 1997, and the warrant of execution was stayed pending the disposition of that petition. In January 1998, while that PCRA petition was pending, petitioner wrote a letter to the PCRA court expressing his desire to withdraw the petition. In January 1999, after three hearings, numerous psychiatric examinations, and the appointment of new counsel for Bronshtein, the PCRA court determined that he was competent to waive his rights and that his waiver was knowing, voluntary, and intelligent. Consequently, the PCRA court dismissed the PCRA petition and vacated the stay of execution.

In February 1999, Bronshtein's mother and sister, as his next friends, appealed to the Supreme Court of Pennsylvania the PCRA court's dismissal of the petition, arguing that he was incompetent to withdraw his PCRA petition. Bronshtein opposed the appeal. The supreme court found that while the next friends had standing to raise the issue of competency,

they had failed to make a compelling showing that Bronshtein was incompetent. *See Commonwealth v. Bronshtein*, 556 Pa. 545, 557, 729 A.2d 1102 (1999). Over a lone dissent,[2] the supreme court denied the next friends' appeal and affirmed the PCRA court's determination that Bronshtein was competent to waive his right to appeal and that his waiver was knowing, intelligent, and voluntary. *See id.*

Following the Supreme Court's decision, petitioner's mother and sister filed a petition for a writ of habeas corpus and a stay of execution in this Court.[3] During a hearing on that petition, in which Bronshtein participated via telephone, Bronshtein informed this Court that he had changed his mind and wanted to pursue post-conviction relief. On April 29, 1999, this Court stayed the warrant of execution and established a briefing schedule for his federal habeas petition. On June 9, 1999, Bronshtein returned to state court and filed with the PCRA court a document styled an "Amended Petition for Habeas Corpus Relief under Article I, Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post-Conviction Relief Act,"

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2. The dissenter believed the next friends had carried the burden of raising a question concerning competency and would have granted a stay of execution pending further psychiatric assessment. *See Bronshtein*, 556 Pa. at 559, 729 A.2d 1102 (Flaherty, C.J., dissenting).

3. This case, then, began in this Court as *Pogrebivsky v. Horn*, Civil Action No. 99-2105, as a result of the next-friends petition of Bronshtein's mother and sister, and when Bronshtein decided to pursue the petition himself, the prior case was closed upon the withdrawal of the next friends' motion, and Bronshtein initiated the instant action.

which was, essentially, a second PCRA petition. That petition was dismissed by the PCRA court, which concluded that Bronshtein had irrevocably waived his rights to post-conviction relief and that the petition was tardy under a one-year time limitation established by 1995 amendments to the PCRA. *See* 42 Pa.C.S. § 9545(b)(1).

Bronshtein appealed the dismissal of his second PCRA petition to the Supreme Court of Pennsylvania. In June 2000, the supreme court affirmed the PCRA court's dismissal, holding that the second PCRA petition was a second or successive petition filed more than one year beyond the date the judgment became final, and thus was late under § 9545(b)(1) and could not be considered on the merits. *See Commonwealth v. Bronshtein,* 561 Pa. 611, 615, 752 A.2d 868 (2000). The supreme court also concluded that the alleged ineffectiveness of petitioner's counsel could not excuse the tardy filing of his PCRA petition. The supreme court therefore concluded that § 9545(b)(1) deprived it of jurisdiction over the petition. *See id.* at 616-17, 752 A.2d 868.

Bronshtein then returned to this Court, where his federal habeas petition had been held in administrative suspense pending the outcome of his PCRA appeal. Now before this Court is the petition of Bronshtein for a writ of habeas corpus.

Appendix C

Procedural Issues—Exhaustion and Procedural Default[4]

Bronshtein's petition faces daunting procedural hurdles that, if resolved in favor of the Commonwealth, would bar the Court from considering the merits of his claims. These procedural issues are quite complex and, especially in light of the high stakes involved in this capital case, require careful consideration. Therefore, I turn first to the procedural issues presented by Bronshtein's petition.

No Pennsylvania court has reached the merits of the issues Bronshtein raises in his federal habeas petition. This is not for lack of effort on Bronshtein's part; he has filed two PCRA petitions, one of which he withdrew by explicit, voluntary waiver, the other of which was dismissed by the Supreme Court of Pennsylvania as procedurally barred.[5]

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4. I note at the outset the recent decision of the Supreme Court of the United States in *Artuz v. Bennett,* 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), in which the Court held that a federal habeas application containing claims that were procedurally barred at the state level is nevertheless "properly filed" as required by 28 U.S.C. § 2244(d)(2). Therefore, though Bronshtein's petition contains numerous claims that clearly were dismissed for procedural reasons at the state level, this Court cannot dismiss his application outright under *Artuz* and must independently consider petitioner's contention that his claims warrant federal habeas review despite his procedural default.

5. I note that while the PCRA court concluded, in dismissing petitioner's second PCRA petition, that petitioner had irrevocably waived all of his rights to any PCRA relief, I conclude that the voluntary withdrawal of his first PCRA petition did not, in and of itself, prevent him from bringing a subsequent PCRA petition. The Commonwealth does not appear to contend otherwise.

The question before me, then, is not whether petitioner exhausted his state remedies. The federal habeas statute requires a petitioner to exhaust the "remedies available in the courts of the State." 28 U.S.C. § 2254; *see Rose v. Lundy,* 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Exhaustion in the habeas context requires only that the same issues, or issues "substantially equivalent" thereto, have been "fairly presented" to the state courts. *See Lambert v. Blackwell,* 134 F.3d 506, 513 (3d Cir.1997). That is precisely what took place in this case; Bronshtein presented the issues in the instant habeas petition to both the PCRA court and the Supreme Court of Pennsylvania.[6] The state courts' rejection of Bronshtein's claims on procedural grounds raises a question not of exhaustion, but of procedural default. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 854, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (Stevens, J., dissenting) ("We therefore ask in federal habeas cases not only whether an applicant has exhausted his state remedies; we also ask how he has done so. This second inquiry forms the basis for our procedural default doctrine: A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].'") (brackets in original) (quoting *Darr v. Burford,* 339 U.S. 200, 204, 70 S.Ct. 587, 94 L.Ed. 761 (1950)); *Carpenter v. Vaughn,* 888 F.Supp. 635, 647 (M.D.Pa.1994) ("When the petitioner fails to exhaust state remedies, the claims are never presented to the state court. When the petitioner procedurally defaults, the claims are presented to the state court in violation of state procedural

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6. The Commonwealth does not contend that petitioner failed to exhaust his claims in state court.

rules, thereby precluding consideration of the merits of the claims."). It is to the latter question that I devote the remainder of my procedural analysis.

1. Introduction to the Independent and Adequate State Ground Doctrine

The Commonwealth's central contention is that this Court cannot hear the merits of Bronshtein's habeas petition because the claims contained therein were presented in state court in violation of a state procedural rule and therefore are procedurally defaulted.

The law of procedural default is an outgrowth of the independent and adequate state ground doctrine, which provides that federal courts may not exercise jurisdiction over state court decisions that are based purely on matters of state law. *See, e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935). The Supreme Court has observed, "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson,* 501 U.S. 722, 7291, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Procedural default due to an adequate and independent state ground does not technically deprive a federal court of jurisdiction; rather, it counsels against federal court involvement out of concern

for comity and federalism. *See Lambrix v. Singletary,* 520 U.S. 518, 523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997).[7]

The independent and adequate state ground doctrine applies equally to state rulings on substantive and procedural matters. *See Coleman,* 501 U.S. at 730. Thus, the doctrine may prevent a federal court from considering the merits of claims made in a federal habeas petition when a state court has declined to hear the merits of those claims because petitioner failed to comply with a state procedural rule. *See Wainwright v. Sykes,* 433 U.S. 72, 82, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The independent and adequate state ground doctrine does not require a federal court to rubber-stamp a state court's procedural dismissal. To the contrary, federal courts are called upon to carefully examine the state rule at issue, and only when a federal court concludes that the state rule is both "independent" and "adequate" must the court dismiss the

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7. As the Supreme Court observed in *Coleman*:

> Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. . . . The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Coleman, 501 U.S. at 732.

petition. *See Coleman,* 501 U.S. at 730-32. The independence of a state rule is not an issue in this case, because there is no question that in denying Bronshtein's PCRA petition, the Supreme Court of Pennsylvania relied exclusively on state and not federal law.[8] Rather, it is the adequacy of the state rule that is crucial to the procedural outcome in this case.

The resolution of the adequacy question requires an investigation of the background and precedent of the relevant state rule or practice. The Supreme Court of the United States has observed that "only a 'firmly established and regularly followed state practice' may be interposed by a state to prevent subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia,* 498 U.S. 411, 423-24, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (quoting *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-58, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958))[9] A state rule is adequate only

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8. The independence of the state ground turns on whether the state court's analysis involves solely state law or is dominated by or interwoven with federal law, and whether the state court clearly and expressly relied upon a state ground in making its decision. *See Harris v. Reed,* 489 U.S. 255, 266, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

9. The primary reason for the adequacy rule is notice. A state procedural rule must "provide[ ] the habeas petitioner with a fair opportunity to seek relief in state court." *Harmon v. Ryan,* 959 F.2d 1457, 1462 (9th Cir.1992). Traditional notions of fairness demand consistent adherence to a procedural rule, lest a petitioner be deprived of notice that the procedural rule will apply to her. *See Calderon v. United States Dist. Court,* 96 F.3d 1126, 1129 (9th Cir.1996)("[I]t is grossly unfair—and serves none of the purposes of respect for

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if it is "consistently and regularly applied," *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), "strictly or regularly followed," *id.*, and applied "evenhandedly to all similar claims," *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). This does not mean that a state's "willingness in a few cases to overlook the rule" renders the rule inadequate. *See Banks v. Horn*, 126 F.3d 206, 211 (3d. Cir.1997). As long as a state has applied the rule in "the vast majority of cases," the rule will be deemed adequate. *Dugger v. Adams*, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); *see Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir.1996).

The Supreme Court observed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), that a procedural rule applied by a state supreme court to bar merits review was inadequate because the petitioner

> could not *fairly be deemed* to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart [federal] review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 457-58 (emphasis added). Thus, the adequacy analysis is an objective one, meaning that the focus of the inquiry is

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procedural rules—to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'").

on the state of the law at the time, and not on the petitioner's actual, subjective awareness or understanding of the procedural rule at issue.

A key question in the adequacy analysis relates to timing: To what point in time should a federal court look in determining whether a state practice or rule was firmly established and regularly and consistently followed? Is the relevant time today, when this Court considers the case? Or when the state supreme court considered the case and applied the rule? Or when the procedural default itself occurred? The Supreme Court of the United States has held that the state rule must be " 'firmly established and regularly followed' by the time as of which it is to be applied." *Ford,* 498 U.S. at 424. The Court of Appeals for the Third Circuit has interpreted this to mean that the relevant moment for determining the adequacy of a state rule is "not . . . when the [Pennsylvania court] relied on it, but rather . . . the date of the waiver that allegedly occurred." *Doctor,* 96 F.3d at 684; *see also Reynolds v. Ellingsworth,* 843 F.2d 712, 725 (3d Cir.1988) ("procedural default is determined by the 'waiver law in effect at the time of the asserted waiver.'").

2. The Adequacy Analysis

The proper inquiry, then, for a federal court considering the adequacy of a state rule or practice in the context of procedural default is to: (1) define the state rule or practice; (2) identify the moment that the procedural default occurred; and (3) review the decisions of the state courts prior to that moment to determine whether the rule was firmly established and regularly and consistently applied at that time.

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a. What Is the Relevant Rule?

The relevant rule in the adequacy analysis is gleaned from the decision of the highest state court that dismissed the claims on procedural grounds. In the instant case, the Supreme Court of Pennsylvania dismissed Bronshtein's second PCRA petition as untimely filed, holding that it was barred by 42 Pa.C.S. § 9545(b)(1), which requires PCRA petitions to be filed within one year of final judgment. *See Commonwealth v. Bronshtein*, 561 Pa. 611, 615, 752 A.2d 868 (2000). The supreme court held that the one-year rule deprived courts of jurisdiction over late-filed petitions, *see id.* at 617, 752 A.2d 868, and was not subject to any exceptions beyond those set forth in the statute, *see id.* at 616, 752 A.2d 868. The relevant rule in this case, then, is the rule that § 9545(b)(1) operates as an absolute, jurisdictional bar to hearing the merits of a late PCRA petition, and that no exceptions outside those in the statute may save a petition filed more than one year after the date judgment becomes final.

b. What Is the Relevant Time?

A federal court's investigation of the adequacy of a state rule is not an appellate review of a state court's procedural decision, and thus it is not this Court's place to determine whether the Supreme Court of Pennsylvania "erred" in dismissing Bronshtein's PCRA petition on procedural grounds. Indeed, this Court has no authority to conduct such a review. Rather, the question before me is one of federal law: Was the state rule sufficiently established, in the eyes of federal law, to put the petitioner on notice that he was about to do irreparable procedural damage to his case?

To answer this question, I must look to state law as it stood at the moment petitioner violated the procedural rule; that is, at the time Bronshtein's one-year window under § 9545(b)(1) closed. The Supreme Court of Pennsylvania identified with precision the date the waiver occurred in this case:

> Here, Appellant's judgment became final on October 20, 1997, the date that the United States Supreme Court denied *certiorari*. Thus, Appellant was required to file his petition for post-conviction relief within one year of October 20, 1997, that is by October 20, 1998, in order for his PCRA petition to be timely filed. Instead, Appellant filed this, his second, petition for post-conviction relief on June 9, 1999, well beyond the one-year limit prescribed by § 9545(b)(1).

Commonwealth v. Bronshtein, 561 Pa. 611, 615, 752 A.2d 868 (2000). The Supreme Court fixed the date of the waiver in this case as October 20, 1998, the date Bronshtein should have filed his second PCRA petition. Thus, my procedural analysis will focus on Pennsylvania law as it stood as of October 20, 1998.

c. Was the One-Year Time Limitation Clearly Established as of October 20, 1998?

An examination of the procedural bar in this case is a complex proposition. Not only must this Court review the history of the rule itself and its application, but I also must inquire into the exceptions applied by the Supreme Court of Pennsylvania to excuse past violations of procedural rules in capital cases.

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The Pennsylvania Post-Conviction Relief Act came into being in 1988, replacing its predecessor, the Post-Conviction Hearing Act ("PCHA").[10] In 1995, the Pennsylvania legislature enacted amendments to the PCRA, which had the effect of further limiting post-conviction relief. The centerpiece of those amendments was a new time limitation on the filing of petitions contained in 42 Pa.C.S. § 9545(b).[11] That section provides:

> **(b) Time for filing petition.—**
>
> (1) *Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date that judgment becomes final,* unless the petition alleges and the petitioner proves that:

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10. The PCRA significantly narrowed the avenues of relief open to convicted criminals, doing away with the PCHA's broad language and limiting relief only to "persons convicted of crimes they did not commit and serving illegal sentences." 42 Pa.C.S. § 9542.

11. The Court of Appeals for the Third Circuit noted in *Lambert v. Blackwell,* 134 F.3d 506 (3d Cir.1997) that before the 1995 amendments to the PCRA went into effect, "the Pennsylvania courts were lenient in allowing collateral review after long delays. . . ." *Id.* at 524 (citing *Commonwealth v. Johnson,* 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. McCabe,* 359 Pa.Super. 566, 519 A.2d 497 (1986); *Commonwealth v. Taylor,* 348 Pa.Super. 256, 502 A.2d 195 (1985)). Thus, the time limits themselves in the 1995 amendments were a departure from a long-standing Pennsylvania practice of excusing tardiness in the filing of collateral appeals in criminal cases.

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. . . .

42 Pa.C.S. § 9545 (emphasis added). The 1995 amendments to the PCRA became effective on January 16, 1996. The Supreme Court of Pennsylvania had no opportunity to consider the time limits set forth in § 9545(b) until December 1998, months after the one-year time limit expired for Bronshtein on October 20, 1998.[12]

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12. Looking to October 1998, the time of Bronshtein's violation of the one-year rule, all Bronshtein had to rely on was the language of the statute. I am doubtful that new, uninterpreted statutory language alone can create a "clearly established" state procedural rule.

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In dismissing Bronsthein's PCRA appeal, the Supreme Court of Pennsylvania held that the one-year time limit was an absolute, jurisdictional time bar, subject to no exceptions. Thus, the question in this case is whether the ground upon which the supreme court dismissed Bronshtein's PCRA petition—that § 9545(b)(1) of the PCRA was an absolute, jurisdictional bar to petitions filed beyond one year and that no exceptions outside those set forth in § 9545(b)(1) could overcome that bar—was clearly established and regularly followed as of October 20, 1998. This Court is not the first to address this question. In fact, a number of courts in this circuit have addressed this question and found that the one-year rule of § 9545(b)(1) was not clearly established until 1999, well after petitioner's default in October 1998.

Most persuasive is the decision of the district court in *Banks v. Horn*, 63 F.Supp.2d 525 (M.D.Pa.1999),[13] which addressed the very question now before this Court. The petitioner in that case had filed a second PCRA petition that was denied by the Supreme Court of Pennsylvania because the petition was filed outside the new one-year time limit for second and successive petitions contained in the amended version of the PCRA, 42 Pa.C.S. § 9545(b)(1), and therefore could not be considered on the merits.[14] Presented with a federal habeas petition filed after that supreme court ruling, the district court in *Banks* examined the adequacy of the one-

13. The petitioner's claims were denied on the merits in *Banks v. Horn*, 63 F.Supp.2d 525 (1999), and the petitioner's appeal is now pending before the Court of Appeals for the Third Circuit.

14. *See Commonwealth v. Banks*, 556 Pa. 1, 5, 726 A.2d 374 (1999).

year filing rule. The district court first engaged in an interpretation of the statutory language of § 9545(b)(1) and concluded that it is not clear from the language and structure of § 9545 that the one-year time limit is an absolute, jurisdictional bar subject to no equitable exceptions. *See Banks*, 63 F.Supp.2d at 532. The court also noted that language one would expect in a jurisdictional time limit statute is nowhere present in subsection (b), which discusses the one-year time limit. *See id.* at 532. Thus, one could reasonably read the one-year time limit as a standard statute of limitations, not a jurisdictional bar.[15] *See id.* at 533 (citing *Lambert v. Blackwell*, 134 F.3d 506, 523-24 (3d Cir.1997)).

The district court in *Banks* also observed that the meaning of the new one-year filing deadline remained uncertain even after the Supreme Court of Pennsylvania

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15. The reason this distinction is important is that jurisdictional limitations are not subject to any exceptions, whereas statutory limitation periods are subject to the equitable tolling doctrine, which has the effect of extending statutory time limitations under certain circumstances. *See Jones v. Morton*, 195 F.3d 153, 159 (3d Cir.1999) ("AEDPA's one-year filing requirement is a statute of limitations, not a jurisdictional rule, and thus a habeas petition should not be dismissed as untimely filed if the petitioner can establish an equitable basis for tolling the limitations period.") (citing *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616 (3d Cir.1998)). Thus, if a petitioner were to reasonably interpret the one-year filing deadline in § 9545(b)(1) as a statute of limitations, and not a jurisdictional bar, such a petitioner would reasonably conclude that a late-filed petition could be excused by the discovery rule or some other equitable tolling doctrine. Under such circumstances, the petitioner would not be on notice that there were no exceptions to the one-year deadline of § 9545(b)(1).

interpreted § 9545(b)(1) for the first time in December 1998. In *Commonwealth v. Peterkin,* 554 Pa. 547, 722 A.2d 638 (1998), the petitioner had filed a second PCRA petition years after his first petition had been resolved, and the PCRA court had dismissed the second petition as premature because of ongoing federal habeas litigation. On appeal to the Supreme Court, the Commonwealth contended that the new time limit contained in § 9545(b) operated to deny the PCRA court jurisdiction over the matter. The Supreme Court examined the text of § 9545(b) and concluded that the petition had been filed outside the one-year time limit, fell within none of the statutory exceptions, and therefore could not be heard. *See id.* at 555, 722 A.2d 638. The *Peterkin* decision, however, contained no discussion of the jurisdictional, absolute nature of the one-year rule in § 9545(b)(1), and thus, the district court in *Banks* concluded, *Peterkin* was "not sufficiently clear to establish the jurisdictional nature of the one-year limitation rule. . . ." *Banks,* 63 F.Supp.2d at 533 n. 6.[16]

It was not until the Supreme Court of Pennsylvania's 1999 decision in *Commonwealth v. Banks,* 556 Pa. 1, 726 A.2d 274 (1999), the district court in *Banks* concluded, that there was a clearly established rule in Pennsylvania that nothing—not even the Pennsylvania's long-standing "relaxed waiver" practice of excusing procedural missteps in capital

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16. Accordingly, as of December 1998, when *Peterkin* was handed down, it was not clearly established that a late-filed petition would not be considered on the merits by the Supreme Court. Regardless, *Peterkin* was decided months after Bronshtein's October 1998 default and therefore could not have put Bronshtein on notice that the Court would have no jurisdiction over his late PCRA petition.

cases[17]— would save a late-filed PRCA petition from

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17. The "relaxed waiver" doctrine is the term given to the Supreme Court of Pennsylvania's long-standing, well-established practice of relaxing its enforcement of state procedural rules in death penalty cases. This practice was explicitly applied in numerous capital cases on both direct appeal and in PCRA proceedings, to reach the merits of petitions despite violations of variety of statutory and judicial procedural rules. *See, e.g., Commonwealth v. Beasley,* 544 Pa. 554, 563, 678 A.2d 773 (Despite the failure of the petitioner to comply with the applicable PCRA procedural rules, and despite the fact that the petition could have and should have been dismissed without a hearing on the merits, the court held, "since this is a capital case, this court will address appellant's claims."), *cert. denied,* 520 S.Ct. 1121, 112 S.Ct. 1257 (1996); *Commonwealth v. DeHart,* 539 Pa. 5, 25, 650 A.2d 38 (1994) ("Appellant concedes that this issue is technically waived because it was not previously raised below, we will nonetheless address it because we have not been strict in applying our waiver rules in death penalty cases."); *Commonwealth v. Zettlemoyer,* 500 Pa. 16, 50 n. 19, 454 A.2d 937 (1982), *cert. denied,* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) ("The primary reason for this limited relaxation of waiver rules is that, due to the final and irrevocable nature of the death penalty, the appellant will have no opportunity for post-conviction relief wherein he could raise, say, an assertion of ineffectiveness of counsel for failure to preserve an issue or some other reason that might qualify as an extraordinary circumstance for failure to raise an issue. Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties will be addressed and, if possible from the record, resolved."); *Commonwealth v. McKenna,* 476 Pa. 428, 441, 383 A.2d 174 (1978) ("The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen.").

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The Supreme Court of Pennsylvania did not begin to change its approach to waiver in capital cases until November 1998, a month after Bronshtein's "waiver." In *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693 (1998), the court observed, "While it has been our 'practice' to decline to apply ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals." Subsequent mentions of *Albrecht* by the Supreme Court of Pennsylvania made it clear that *Albrecht* marked a sea-change in the court's approach to waiver in death penalty cases. *See, e.g., Commonwealth v. Pirela*, 556 Pa. 32, 41 n. 5, 726 A.2d 1026 (1999) ("Although we have declined to apply ordinary waiver principles to capital cases in the past, we *recently held that this practice will be discontinued.*") (emphasis added), *cert. denied*, 528 U.S. 1082, 120 S.Ct. 804, 145 L.Ed.2d 677 (2000).

The rule of *Albrecht* was applied directly to the one-year deadline in § 9545(b)(1) in *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (1999). The *Banks* decision relied on *Albrecht* in concluding that

> the issue here is one of jurisdiction and not waiver. The Legislature has spoken on the requisites of receiving relief under the PCRA and has established a scheme in which PCRA petitions are to be accorded finality. The gravity of the sentence imposed upon a defendant does not give us liberty to ignore those clear mandates.

Id. at 6, 726 A.2d 374; *see also Commonwealth v. Fahy*, 558 Pa. 313, 325, 737 A.2d 214 (1999).

While it now appears to be clearly established that a late-filed PCRA petition will no longer be considered under the relaxed waiver rule, back in October 1998, relaxed waiver remained viable in PCRA

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dismissal. *See Banks*, 63 F.Supp.2d at 534. The district court observed:

> [W]e do not think that, prior to the holding of the Supreme Court in [*Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 274 (1999)] *Banks* can be said to have had notice that § 9545(b) would be considered jurisdictional. Only at the time of that ruling can it be said with certainty that Banks would be absolutely barred from presenting unexhausted claims to the state courts on the basis of jurisdiction which, from respondent's point of view, also would mean that Banks had forfeited, without notice, his exhausted claims. We conclude that this would not be an adequate state ground. . . .

Id.[18] The district court also concluded that because of

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cases. Because it is clear that the relaxed waiver doctrine did not fall out of favor in the PCRA context until after the waiver in the instant case occurred, Bronshtein's second PCRA petition was not dismissed on the basis of an adequate state ground. Thus, Pennsylvania's relaxed waiver rule offers further support for my conclusion that it was not clearly established at the time of Bronshtein's waiver that a late-filed PCRA petition in a capital case would not be considered on the merits.

18. In *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (1999), the Supreme Court of Pennsylvania considered a procedural scenario similar to that in *Peterkin;* a second PCRA petition filed years after final judgment but within a year after the effective date of the 1995

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Pennsylvania's "relaxed waiver" practice in capital cases, the time limit set forth in § 9545(b)(1) was not adequate for the purposes of procedural default. The district court then proceeded to consider the merits of the habeas petition. *See id.*

The district court's 1999 decision in *Banks* is directly on point. The persuasive reasoning of that decision demonstrates that it was neither clearly established nor regularly followed at the time of Bronshtein's waiver in October 1998, that a late-filed PCRA petition in a capital case would be dismissed as untimely. Three other judges in this district have concluded that it was not clearly established that § 9545(b)(1) bars all untimely petitions in capital cases until at least December 1998, well after Bronshtein's October 1998 default. *See Pace v. Vaughn,* No. 99-6568, 2001 U.S.

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amendments to the PCRA. The court concluded, "Appellant's petition does not fall within any exception to the one-year requirement and the common pleas court lacked jurisdiction to entertain Appellant's claims." *Id.* at 5-6, 726 A.2d 374. Since *Banks*, the Supreme Court has consistently treated the time limits in the PCRA as jurisdictional. *See Commonwealth v. Lark*, 560 Pa. 487, 495, 746 A.2d 585, 589-90 (2000) (referring to the "PCRA's jurisdictional time bar"); *Commonwealth v. Murray*, 562 Pa. 1, 5, 753 A.2d 201 (2000) ("In addition, given the fact that the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner."); *Commonwealth v. Fahy*, 558 Pa. 313, 325, 737 A.2d 214 (1999) ("Based upon the dictates of the PCRA it is clear that Appellant has failed to satisfy the PCRA's time requirements; thus we have no jurisdiction to entertain the petition.").

Dist. LEXIS 7657, at *6-7 (E.D. Pa. June 7, 2001) (concluding that jurisdictional nature of § 9545(b) was not clear until 1999); *Fidtler v. Gillis,* No. 98-6507, 1999 U.S. Dist. LEXIS 12141, at *9 (E.D.Pa. Aug. 6, 1999) (not clear that one-year rule would bar merits review until December 1998); *Holman v. Gillis,* 58 F.Supp.2d 587, 594 (E.D.Pa.1999) (one-year rule was not clearly established until at least December 1998); *see also Peterson v. Brennan,* No. 97-3477, 1998 U.S. Dist. LEXIS 12327, at *19 (E.D.Pa. Aug. 11, 1998) ("The possibility exists, therefore, that . . . the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar."); *Hammock v. Vaughn,* No. 96-3463, 1998 U.S. Dist. LEXIS 4562, at *6-7 (E.D. Pa. April 7, 1998) (same); *Lambert v. Blackwell,* 134 F.3d 506, 524 (3d Cir.1997) ("We note that to date, no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision.").

I find the district court's decision in *Banks,* as well as the decisions in *Pace, Fidtler,* and *Holman,* to be persuasive, and concur with their conclusions that the rule that the one-year limitation in § 9545(b)(1) was not subject to equitable tolling or relaxed waiver was neither clearly established nor regularly followed at the time of Bronshtein's waiver.

The Court of Appeals for the Third Circuit recently removed all doubt as to whether the law concerning the one-year limitation in § 9545(b) was clearly established at the time of Bronshtein's procedural default. In *Fahy v. Horn,* 240 F.3d 239 (3d Cir.2001), the court of appeals observed:

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> [A]t the time Fahy filed his fourth PCRA petition, Pennsylvania law was unclear on the operation of the new PCRA time limit. The Pennsylvania courts could have accepted Fahy's petition as timely because of its role within the capital case, *see Banks v. Horn*, 125 F.3d 206 (3d Cir.1997), or could have found the government interference exception applicable. *See Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585 (2000). The law at the time of Fahy's petition was inhibitively opaque. Fahy filed his fourth PCRA petition in November 1997, months before the Supreme Court announced that it would no longer observe the relaxed waiver rule in *Commonwealth v. Albrecht*, 554 Pa. 31, 720, 720 A.2d 693 A.3d 693 (1998). Further, the Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 in *Commonwealth v. Banks*, 556 Pa. 1, 726 A.2d 374 (1999). In *Banks*, 126 F.3d at 214, we rejected the Commonwealth's claim that a PCRA petition would be time barred and required Banks to return to state court because we could not confidently determine that the state court would not apply the relaxed waiver rule it had applied in previous capital cases. If we could not predict how the Pennsylvania court would rule on this matter, then surely we should not demand such foresight from the petitioner.

Id. at 245. *Fahy*, then, confirms the holding of the district court in *Banks* that it was not until after the Pennsylvania

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Supreme Court decisions of *Albrecht* in 1998 and *Banks* in 1999 by the Supreme Court of Pennsylvania that Pennsylvania's strict, exceptionless adherence to the one-year limitation period in § 9545(b)(1) was clearly established. This Court is bound by the analysis set forth in *Fahy*, and therefore, I have no choice but to conclude that it was not clearly established at the time of Bronshtein's waiver in October 1998 that the Supreme Court would refuse to hear a late-filed PCRA petition.

In light of the statutory language of § 9545(b)(1), the Supreme Court of Pennsylvania cases interpreting that language as a jurisdictional bar, the supreme court's past practice of relaxing waiver in death penalty cases and its recent break with that practice, and persuasive and binding federal precedent, I conclude that the rule upon which the Supreme Court of Pennsylvania based its dismissal of Bronshtein's second PCRA petition was not adequate. Because the rule was not adequate, I conclude that there was no procedural default sufficient to prevent this Court from considering the merits of the claims in Bronshtein's federal habeas petition.[19] I therefore proceed to a consideration of the merits of his claims.

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19. Another possible state procedural bar is that petitioner failed to object to a number of the claimed errors during his trial and sentencing and thereby waived those issues. *See* Pa. R.App. P. 302. The Supreme Court of Pennsylvania did not rely on this ground in concluding that petitioner's claims were procedurally barred, and therefore it is not necessary to address it here. The Commonwealth does not raise this procedural issue, likely because it is a non-starter. Nonetheless, I believe the issue warrants a brief analysis.

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As discussed above, *supra* at 18, n. 21, until November 1998, the Supreme Court of Pennsylvania applied the "relaxed waiver" doctrine to capital cases, considering the merits of issues on direct appeals and PCRA appeals despite the fact that they were presented in violation of procedural rules. Rule 302 of the Pennsylvania Rules of Appellate Procedure provides that a failure to object at trial constitutes waiver of an issue for the purposes of appeal. Nevertheless, up until November 1998, the Supreme Court of Pennsylvania regularly excused violations of Rule 302 in capital cases on both direct and PCRA appeals. *See, e.g., Commonwealth v. DeHart,* 539 Pa. 5, 650 A.2d 38 (1994) (considering merits of issue on PCRA appeal despite failure to object at trial); *Commonwealth v. Harris,* 550 Pa. 92, 101 n. 5, 102 n. 7, 103 n. 9, 703 A.2d 441 (1997) (same on direct appeal), *cert. denied,* 525 U.S. 1015, 119 S.Ct. 538, 142 L.Ed.2d 447 (1998). Thus, under the regime in place at the time of Bronshtein's default, the Supreme Court of Pennsylvania would likely have considered the merits of the issues raised in his PCRA petition despite his failure to object to the issues during his trial.

The Supreme Court announced in November 1998 that it was departing from its relaxed waiver practice in PCRA cases, and would no longer consider procedurally defaulted issues raised in PCRA appeals. *See Commonwealth v. Albrecht,* 554 Pa. 31, 720 A.2d 693 (1998). But any possible waiver of claims by Bronshtein due to his failure to object at trial took place long before the Supreme Court changed its tune on relaxed waiver in 1998. Therefore, there is no question that the rule announced in *Albrecht* was not clearly established at the time of Bronshtein's alleged default, and therefore the *Albrecht* rule is not adequate to bar federal habeas review of these issues. I conclude that even if this were raised, it would not bar this Court's review of the Bronshtein's habeas claims.

I do not believe that petitioner's failure to object at trial raises an exhaustion issue, but even if it did, that would not prevent review

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Appendix C

Merits Analysis

The threshold question on the merits of Bronshtein's claims is what standard of review governs his petition. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which went into effect on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. 2254, by elevating the level of deference applied to state court

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by this Court. This is because the mandatory review of death penalty cases required by Pennsylvania statutory law demands that the supreme court review the entire record of the case to determine whether "the sentence of death was the product of passion, prejudice or any other arbitrary factor." 42 Pa.C.S. § 9711(h)(3)(ii). Likewise, the supreme court has held that in death penalty cases, the court must review "the sufficiency of the evidence to sustain a conviction of murder of the first degree." *Commonwealth v. Ockenhouse*, 562 Pa. 481, 489-90, 756 A.2d 1130, *cert. denied*, U.S., 532 U.S. 932, 121 S.Ct. 1381, 149 L.Ed.2d 307 (2000) (citation omitted). Thus, the Supreme Court of Pennsylvania is required by statute and precedent to conduct a thorough review of the conviction and sentence in capital cases to determine whether there were any fundamental errors. Even when a petitioner fails to raise a particular constitutional issue, the mandatory review of capital convictions and sentencings required in Pennsylvania is sufficient to exhaust fundamental constitutional claims of the kind raised here by Bronshtein. *See Beam v. Paskett*, 3 F.3d 1301 (9th Cir.1993) (concluding that an Idaho statute worded identically to Pennsylvania's required a review of death penalty cases that exhausted petitioner's constitutional claims, even though he failed to raise them in post-trial motions and thus procedurally defaulted on them), *cert. denied*, 511 U.S. 1060, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994).

determinations. Petitioner argues that because no Pennsylvania court has considered the merits of his claims, the AEDPA's highly deferential standard does not apply.

Petitioner's argument has its genesis in 28 U.S.C. § 2254(d), which, as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Facially, § 2254 applies only to claims that were "adjudicated on the merits in State court proceedings." There is some controversy among the circuits as to precisely what the "adjudicated on the merits" clause means; some courts contend that it means that under § 2254(d) "even the most summary orders disposing of federal claims without comment are adjudications on the

merits," *Washington v. Schriver,* No. 00- 2195, 2001 U.S.App. LEXIS 13480, at *20 (2d Cir. Jan. 15, 2001) (citations omitted), while other courts have held that § 2254(d) cannot apply unless the state court expressly explains the merits of a claim of a federal constitutional violation, *id.* at 21-22.

The Court of Appeals for the Third Circuit has come down on the latter side of this debate. In *Hameen v. Delaware,* 212 F.3d 226, 248 (3d Cir.2000), *cert. denied,* U.S., 532 U.S. 924, 121 S.Ct. 1365, 149 L.Ed.2d 293 (2001), the court of appeals carefully reviewed the state supreme court decision to determine whether that court had addressed the merits of a particular claim. The court of appeals concluded that because the Delaware Supreme Court

> did not pass on Ferguson's Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so . . . we cannot say that the Delaware Supreme Court took into account controlling Supreme Court decisions. This point is critical because under the AEDPA the limitation on granting of an application for a writ of habeas corpus is only "with respect to any claim that was adjudicated on the merits in State court proceedings." Hence, we exercise pre-AEDPA independent judgment on the duplicative aggravating circumstances claim.

Id. at 248. Thus, under binding Third Circuit precedent set forth in *Hameen,* the AEDPA standard of review established by § 2254(d) does not apply unless it is clear from the face of the state court decision that the merits of the petitioner's

constitutional claims were examined in light of federal law as established by the Supreme Court of the United States.

Bronshtein's case provides the quintessential circumstance of a state court's failure to adjudicate claims on the merits. The Supreme Court of Pennsylvania expressly refused to adjudicate the merits of any of the constitutional claims set forth in Bronshtein's PCRA petition because it was filed outside the one-year time limit set forth by 42 Pa.C.S. § 9545(b). Thus, Bronshtein's claims were not "adjudicated on the merits in State court proceedings," a prerequisite to the application of the highly deferential standard of review contained in § 2254(d) as amended by the AEDPA. Accordingly, I conclude that the AEDPA does not apply to Bronshtein's petition, and that his petition is governed by pre-AEDPA standards.

Prior to the AEDPA, a state court's resolutions of constitutional issues were accorded little deference, and pure questions of law and mixed questions of law and fact were reviewed *de novo*. *See Williams v. Taylor,* 529 U.S. 362, 400, 120 S.Ct. 1495, 146 L.Ed.2d 389 (opinion of O'Connor, J.) (citing *Miller v. Fenton,* 474 U.S. 104, 112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). Under the pre-AEDPA standard, the state court's factual findings are presumed to be correct unless, *inter alia,* the state court's findings are not "fairly supported by the record." *Pemberthy v. Beyer,* 19 F.3d 857, 864 (3d Cir.1994) (quoting 28 U.S.C. § 2254(d)(8) (1994)).

With this standard in mind, I turn to the merits of petitioner's claims.

Appendix C

1. Jury Instruction on Co-Conspirator Liability

In Pennsylvania, a person may not be found guilty of first degree murder unless it is established beyond a reasonable doubt that she had specific intent. *See* 18 Pa.C.S. § 2502(a). This holds true for accomplices and co-conspirators. *See Commonwealth v. Huffman*, 536 Pa. 196, 199, 638 A.2d 961 (1994); *Commonwealth v. Bachert*, 499 Pa. 398, 406, 453 A.2d 931 (1982), *cert. denied*, 460 U.S. 1043, 103 S.Ct. 1440, 75 L.Ed.2d 797 (1983). While a defendant may be guilty of first-degree murder in Pennsylvania absent proof that she actually "pulled the trigger," she cannot be found guilty of first-degree murder unless it is proved beyond a reasonable doubt that she intended that the killing to occur. *See Smith v. Horn*, 120 F.3d 400, 410 (3d Cir.1997).

It is axiomatic, then, that when jury instructions have the effect of relieving the Commonwealth of the burden of proving beyond a reasonable doubt that a defendant had specific intent, those instructions are erroneous under Pennsylvania law. *See Commonwealth v. Wayne*, 553 Pa. 614, 632, 720 A.2d 456 (1998) ("To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable."). Moreover, the Due Process Clause of the Fourteenth Amendment is implicated when instructions given to the jury condemn petitioner absent proof beyond a reasonable doubt of an essential element of a crime. *See In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("the Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

Bronshtein challenges the following language in the jury instruction on co-conspirator liability, which applied to all the crimes of which he was accused, including first degree murder:

> [A] defendant may by reason of being a member of a conspiracy become liable for a crime he did not personally commit. He may be found guilty under this conspiracy theory in some situations where he could not be convicted under an accomplice theory. I'm going to tell you what accomplice means a little bit later.
>
> You may find the defendant [guilty] of either the crime of murder, robbery, or theft as a conspirator if you're satisfied beyond a reasonable doubt: First, that the defendant agreed with this John Doe or Mr. X that the defendant would aid John Doe or Mr. X in committing either the crime of murder, robbery and /or theft; second that the defendant so agreed with the intent of promoting or facilitating the commission of the crime; third, that while the agreement remained in effect the crime of murder, robbery, and/or theft was committed by John Doe or Mr. X and, fourth, that the crime of murder, robbery and/or theft, while it may differ from the agreed crime, was committed by John Doe or Mr. X in furtherance of his and the defendant's common scheme.

> What am I saying to you? If those four elements have been established, then, if you find the defendant is guilty of the conspiracy, he is also guilty of anything that John Doe or Mr. X did in furtherance of it. That's what I'm saying.

(Trial Transcript, April 20, 1994, at 215-16.) The following day, the trial court instructed the jury that it could find Bronshtein guilty of first degree murder if he "was a co-conspirator of one who had the specific intent to kill." (Trial Transcript, April 21, 1994, at 6.)

The effect of these co-conspirator liability instructions, Bronshtein argues, was to permit the jury to find him guilty of first degree murder absent proof that he had the requisite specific intent to kill. The Commonwealth counters that the trial judge instructed the jury at length on specific intent as a required element of first degree murder, and thus did not relax its burden of proving specific intent.[20]

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20. Prior to the co-conspirator liability instructions, the trial court gave the following general instruction regarding first degree murder.

> What is first-degree murder. Well, first-degree murder is a murder in which the killer has the specific intention to kill. You may find the defendant guilty of first-degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt—remember, every element of every crime must be proven beyond a reasonable doubt, each one— first, Alexander Gutman is dead—I suggest to you that issue

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is not in dispute; second, that the defendant killed him—that certainly is in dispute; and three, that the defendant did so with the specific intent to kill and with malice. All right. Specific intent to kill is part of first-degree murder. Malice is part of all murder. Those three elements— Alexander Gutman is dead; two, the defendant killed him; and three, that the defendant did so with the specific intent to kill and with malice— that's first degree murder.

A person has the specific intent to kill if he has a fully formed intent to kill and is conscious of his own intention. As my earlier definition of malice indicates, a killing by a person who has the specific intent to kill is a killing with malice. I don't want to misstate the evidence—and if I'm wrong on this or you construe the arguments differently, your own recollection will control. I don't think the issue of whoever it was that killed Mr. Gutman did so without a specific intent to kill. I think everybody has conceded that whoever did it had the intent. That's not where the issue really is, I don't believe; but if you think it's part of the case, that's an element, you have to do it.

Stated differently, a killing is with specific intent to kill if it is willful, deliberate and premeditated. The specific intent to kill, including premeditation, needed for first-degree murder does not require planning or previous thought for any particular length of time. It can occur quickly. All that is necessary is that there be time enough so that the defendant can and does fully form an intent to kill and is conscious of the intention.

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It is clear from the bare language of the jury instructions given at Bronshtein's trial that the trial court impermissibly relieved the Commonwealth of the burden of proving beyond a reasonable doubt a key element of first degree murder: specific intent. The problem lies in the trial court's discussion of co-conspirator liability. In that instruction, the trial court first instructed the jury that Bronshtein could be guilty of "murder, robbery, or theft" if it found that he had agreed with another to commit "murder, robbery, and/or theft." This language lumped the specific intent crime of first degree murder together with the two general intent crimes of robbery and theft, and suggested that a finding that Bronshtein merely agreed to commit either robbery or theft would be enough to find him guilty of first degree murder. The use by the Court of the conjunctive and imprecise language "and/or" further muddied the waters, creating the real potential for the jury to incorporate the intent to commit one crime into its

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> In deciding whether the defendant had the specific intent to kill, you should consider all of the evidence regarding his words and conduct and the attending circumstances that may show his state of mind. If you believe that the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may regard that as [an] item of circumstantial evidence from which you may, if you choose, infer that the defendant had the specific intent to kill.
>
> So that's first-degree. Someone is dead. The defendant killed him. The defendant did so with the specific intent to kill and with malice.

(Trial transcript, April 20, 1994, at 191-202.)

consideration of guilt for another crime. Because first degree murder requires a finding of specific intent, the mix-and-match approach to intent described by the co-conspirator liability instruction given at Bronshtein's trial was clearly erroneous.

The trial court then instructed the jury that in order to find co-conspirator liability, it must find beyond a reasonable doubt that Bronshtein had "the intent of promoting or facilitating the commission of the crime." This instruction begs the question: Which crime? Drawing on the list that immediately preceded this language, the jury could choose from among "murder, robbery, and/or theft," and thus find Bronshtein guilty of murder even if the evidence proved only that he intended to commit robbery or theft. Thus, the failure of the trial court to define with precision the criminal intent required to find Bronshtein guilty under a co-conspirator liability theory removed the element of specific intent from the jury's consideration and rendered the jury instructions erroneous under Pennsylvania law.

Another problematic aspect of the co-conspirator liability charge was the trial court's instruction that "if you find the defendant is guilty of conspiracy, he is also guilty of anything that Mr. X did in furtherance of it." This language reinforces the confusing array of possibilities created by the prior language by permitting the jury to find Bronshtein guilty of first degree murder regardless of his intent. The language on its face suggests that as long as Bronshtein was part of any kind of conspiracy—including a conspiracy to commit merely robbery or theft—he could also be found guilty of any crime committed by his co-conspirator, including first degree murder.

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The errors in co-conspirator liability instructions were only exacerbated by the trial court's instruction the following day that the jury could find Bronshtein guilty of first-degree murder if he "was a co-conspirator of one who had the specific intent to kill." (Trial Transcript, April 21, 1994, at 6.) This made explicit what was implicit in the previous day's instructions; under this instruction, Bronshtein could be found guilty of first degree murder even if the Commonwealth had not proved that he possessed a specific intent to kill.

The general instructions as to first degree murder, which preceded the co- conspirator instructions, do not cure the problem created by the co-conspirator liability instructions. The general first degree murder instructions contain a detailed discussion of specific intent, however, the specific intent discussion was contradicted, or at least confused, by the co-conspirator liability charge. A reasonable jury could have understood the co-conspirator language to be an alternate means to establish first degree murder, *sans* a finding of specific intent to kill.

The trial court easily could have avoided such confusion by making it clear in its discussion of co-conspirator liability that Bronshtein could only be liable for first degree murder as a co-conspirator if it was proved beyond a reasonable doubt that he had the requisite specific intent to kill. Such language was included in the accomplice liability instruction,[21] but the co-

21. The accomplice liability instruction included the following: "Remember when we talked about first-degree murder? That's the one that requires specific intent to kill? Yes, it is possible to convict the defendant as an accomplice to that even if he's not the one who killed Mr. Gutman, but you'd have to find that he shared that specific intent to kill Alexander Gutman before you can find him guilty as an accomplice. . . ." (Trial Transcript, April 20, 1994, at 219.)

conspirator liability instruction strangely and erroneously contained no such clarifying language; to the contrary, it bound together the jury's consideration of the three crimes with which petitioner was charged in a manner that allowed the question of Bronshtein's specific intent to kill to become virtually irrelevant to the jury's deliberations.

The above textual analysis of the jury instructions is confirmed by both state and federal precedent. The Supreme Court of Pennsylvania has repeatedly affirmed the proposition that in first degree murder cases, accomplice and co-conspirator liability charges must be carefully crafted to avoid relieving the Commonwealth of the burden of establishing specific intent. In *Commonwealth v. Huffman*, 536 Pa. 196, 638 A.2d 961 (1994), the Supreme Court was confronted with jury instructions in a case involving charges similar to those in the instant case: burglary, robbery, and first degree murder. The jury in *Huffman* was given instructions on the subject of accomplice and co-conspirator liability that read, in pertinent part, "you must find that the Defendant's act or the act of an accomplice or co-conspirator is the legal cause of death of [the victim], and thereafter you must determine if the killing was intentional." *Id.* at 198-99, 638 A.2d 961. The supreme court held that this instruction

> allowed the jury to reach a first-degree murder verdict with no finding of the requisite mental state of 'specific intent to kill' . . . Under the contested instruction, the jury needed only to find that appellant had conspired to commit or assisted in a burglary with the actual murderer in order to

> find him guilty. Permitting such a faulty verdict to stand would be to tolerate a miscarriage of justice.

Id. at 198-99, 201, 638 A.2d 961. The supreme court found the error was not harmless, set aside the conviction, and remanded for a new trial. *See id.* at 202, 638 A.2d 961.

Bronsthein's instructions evoke the very concerns raised by the Supreme Court of Pennsylvania in *Huffman*. This case, too, involves a charge of first degree murder, co-conspirator and accomplice liability theories, and other lesser crimes not requiring specific intent. As in *Huffman*, the Bronshtein court's instruction on co-conspirator liability conflated the first degree murder charge with the lesser charges and allowed the jury to convict petitioner of first degree murder absent proof that he had a murderous intent. The language of the instant case—"if you find the defendant is guilty of conspiracy, he is also guilty of anything that Mr. X did in furtherance of it"—echoes the instructions in *Huffman*—"you must find that the Defendant caused the death of another person, or that an accomplice or co-conspirator caused the death of another person." Both instructions permitted the jury to use the intent of a co-conspirator to convict the defendant of first degree murder. Thus, the co-conspirator instruction in the instant case poses the very problem that rendered the instructions a "miscarriage of justice" in *Huffman*.

Relying on *Huffman* in a more recent first degree murder case, the Supreme Court of Pennsylvania found another set of co-conspirator instructions erroneous. The instructions in *Commonwealth v. Wayne*, 553 Pa. 614, 629, 720 A.2d 456

(1998), read, "The co-conspirator is responsible for the mental state from the person who actually pulled the trigger." On appeal, the supreme court observed,

> To be guilty of first degree murder, each co-conspirator must individually be found to possess the mental state necessary to establish first degree murder—the specific intent to kill. . . . To allow a conviction for first degree murder to stand without proof beyond a reasonable doubt establishing that the accused actually harbored the specific intent to kill, would be unconscionable. Accordingly, we agree with appellant that the charge as given here was erroneous.

Id. at 632, 720 A.2d 456. However, the court concluded that because first degree murder was the only crime at issue in the case, the "conspiracy had only one object, the deliberate decision to take a life," *id.* at 634, 720 A.2d 456, and thus, despite the unclear co-conspirator liability instruction, there was no possibility that the jury had found anything but an intent to kill on the part of the defendant. Therefore, the supreme court concluded, the Commonwealth was not relieved of its burden of proving specific intent on the part of the defendant.

The *Wayne* instruction—"The co-conspirator is responsible for the mental state from the person who actually pulled the trigger"—is strikingly similar in effect to the trial court's instruction at Bronsthein's trial that the jury could find him guilty of first-degree murder if he "was a co-conspirator of one who had the specific intent to kill." (Trial

Transcript, April 21, 1994, at 6.) The instructions given at Bronshtein's trial were stained by the same error identified in *Wayne;* the possibility that a jury could convict the defendant on the first degree murder charge based solely on the intent of his co-conspirator, and absent a finding that he intended a killing to take place. And because the alleged conspiracy in Bronshtein's case involved charges other than first degree murder, the factual matrix that rendered the error harmless in *Wayne* was absent in Bronshtein's case; Bronshtein could have been convicted of murder on a co-conspirator liability theory even if he only intended to commit robbery or theft. Thus, *Wayne* conclusively demonstrates that the instructions given to the jury in Bronshtein's case were deeply flawed.

The flaw here is not merely a mistake of state law; the error in the jury instructions here implicates petitioner's federal constitutional rights. In *Smith v. Horn,* 120 F.3d 400 (3d Cir.1997), the petitioner objected to the trial court's instructions as to accomplice and co-conspirator liability, claiming that the instructions relieved the Commonwealth of the burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law. The instructions on co-conspiratorial liability in *Smith* read:

> You should . . . determine . . . whether there was the requisite intent to enter into this conspiracy to commit the robbery and killing which the Commonwealth contends flowed therefrom or whether there was the requisite intent to enter in and be the accomplice with the other in bringing this about. That is to say, did Clifford Smith agree,

> although not necessarily by words, but by conduct and circumstances to bring about this robbery which, in turn, led to the ultimate shooting, so the Commonwealth contends, and the killing of Richard Sharp? If so, then the major basis of conspiratorial liability exists as to him.

Id. at 406. The court of appeals found this instruction problematic, observing,

> The [trial] court did not clarify to which crime this 'conspiratorial liability' applies; the charge was given in the context of the general conspiracy instruction. Thus, it is likely that the jury understood this charge as instructing that Smith could be found guilt of conspiracy to commit first-degree murder if he intended to commit the robbery even if he did not intend that the killing be committed.

Id. at 413. Combined with vague instructions on accomplice liability and specific intent, the co-conspirator liability language rendered the instructions erroneous.

The co-conspirator liability instruction given in Bronshtein's case presents the same shortcomings identified by the court of appeals in *Smith;* it allowed the defendant to be convicted without proof of his specific intent that a killing would result. Like *Smith,* this case involved charges of robbery and first degree murder, and a co-conspirator liability instruction that failed to require the jury to find specific intent to kill on the part of the defendant. The instruction in Smith

lumped the intent to commit robbery and murder together just as instruction in Bronshtein's case, thus allowing the jury to convict the petitioner of first degree murder even though the evidence showed only an intent to commit robbery. Both instructions effectively nullified an essential element of the crime of first degree murder. Accordingly, under *Smith*, the co-conspirator liability instruction in Bronshtein's case constituted not only a violation of state law, but a violation of a federal constitutional right.

While the Commonwealth argued in *Smith* that the Court of Appeals for the Third Circuit was bound by the determination of the Supreme Court of Pennsylvania that the jury instructions were not in error, the court of appeals disagreed, observing that "where an allegedly faulty jury charge implicates a habeas petitioner's federal constitutional rights, as we conclude in the next section this charge did, we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue." *Smith*, 120 F.3d at 413. While a state may define the elements of a crime as it sees fit, the court of appeals noted, once it has done so, the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the crime. *See id.* at 414-15 (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); *see also Rock v. Zimmerman*, 959 F.2d 1237, 1246 (3d Cir.), *cert. denied*, 503 U.S. 1222, 112 S.Ct. 3036 (1992). "A jury instruction that omits or materially misdescribes an essential element as defined by state law relieves the state of its obligation to prove facts constituting every element of the offense beyond a reasonable doubt, thereby violating the defendant's due process rights." *Id.* at 415 (citing *Carella v.*

California, 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (per curiam); (*Rock*, 959 F.2d at 1245-46)). Because the jury instructions at issue had allowed the Commonwealth to secure a conviction without proving the essential element of specific the court of appeals held that Smith's due process rights had been violated and that he was entitled to a new trial and sentencing. For the reasons discussed above, I conclude that the instructions given at Bronshtein's trial present the very same constitutional problems that tainted the jury instructions in *Smith*.

The jury instructions given at Bronshtein's trial present a pure question of law that is entitled to no deference under pre-AEDPA standards. My review of the text of the jury instructions in light of *Smith*, *Huffman*, and *Wayne*, compel the conclusion that they instructions impermissibly relieved the Commonwealth of the burden of proving beyond a reasonable doubt an essential element of the crime of first degree murder, and thus ran afoul of the Due Process Clause of the Fourteenth Amendment. Furthermore, I cannot conclude that the error here was harmless; the Court of Appeals for the Third Circuit held under the very similar circumstances of *Smith* that the jury instructions that tended to relieve the Commonwealth of its burden of proving the essential element of specific intent was not harmless error. *See Smith*, 120 F.3d at 419.[22] Therefore, petitioner is entitled to habeas relief on this claim as a matter of law.

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22. The *Smith* court noted that "several pre-*Roy* [*California v. Roy*, 519 U.S. 2, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996)] decisions from both the Supreme Court and this Court all hold that similar types of instructional error constitute trial error." *See Smith*, 120 F.3d at 417 (citing cases).

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2. Life Means Life Without Parole Instruction

Petitioner also claims that he was entitled to an instruction to the jury at the sentencing phase that a sentence of life in prison would mean life without parole under Pennsylvania law.[23]

Petitioner relies on *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[24] There, the

23. I note that it appears the petitioner did not object at trial to the trial court's failure to instruct the jury that life means life without parole. However, as discussed *supra* in footnote 19, petitioner's failure to raise this issue at trial does not mean that this claim is procedurally defaulted, because of the relaxed waiver doctrine and the Supreme Court of Pennsylvania's mandatory obligation to conduct a searching review of trial and sentencings in death penalty cases.

24. I note at the outset that plaintiff's *Simmons* claim is not barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), under which federal habeas relief may only be had under rules that were clearly established at the time of the relevant state court decision. The Supreme Court has held that the date to which federal courts should look in applying *Teague* is the date the judgment of conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 382, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Bronshtein's petition became final when " 'the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision . . .' ." *Allen v. Hardy*, 478 U.S. 255, 258 n. 1, 106 S.Ct. 2878, 92 L.Ed.2d 199, (1986) (per curiam) (quoting *Linkletter v. Walker*, 381 U.S. 618, 622, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)). That date was October 20, 1997, the when the United States Supreme Court denied *certiorari*. *Simmons* was decided in 1994, and therefore its rule regarding the life-means-life-without-parole instruction was clearly established at the time Bronshtein's judgment became final three years later.

petitioner was sentenced to death after the state trial court refused to instruct the jury that the only available alternative sentence—life in prison—would mean that the petitioner would never be released on parole. The Court concluded that in refusing to instruct the jury of petitioner's ineligibility for parole, the state court denied petitioner his only means to rebut the prosecutor's argument that petitioner should be put to death so that he would not be a danger to the public if released from prison. *See id.* at 163. The Court concluded, "Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court." *Id.* at 169. The Court reaffirmed the *Simmons* decision in *Shafer v. South Carolina,* U.S., 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001), holding that "whenever future dangerousness is at issue in a capital sentencing proceeding under South Carolina's new scheme, due process requires that the jury be informed that a life sentence carries no possibility of parole." *Id.* at 1273.

The Supreme Court noted in *Simmons* that Pennsylvania was one of only three states—along with Virginia and South Carolina—that "have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact." *Simmons,* 512 U.S. at 168, n. 8. In *Shafer,* the Court observed that since *Simmons* was decided in 1994, only Virginia had discontinued this practice. *See Shafer,* 532 U.S. at __, n. 4, 121 S.Ct. at 1271, n. 4. Thus, the general practice of not informing the jury of parole ineligibility that the Supreme

Court found constitutionally flawed in *Simmons* and *Shafer*, is alive and well today in Pennsylvania.[25]

That practice is apparent in this case. First, the petitioner was convicted of first degree murder, and therefore, under Pennsylvania law, would have been ineligible for parole if sentenced to life in prison. *See* 42 Pa.C.S. § 9756(c); 61 Pa.C.S. § 331.21; *Commonwealth v. Yount*, 419 Pa.Super. 613, 622, 615 A.2d 1316 (1992) (holding that section 9756(c) "unequivocally bars all parole for first degree murderers").

Second, the prosecutor unmistakably placed Bronshtein's future dangerousness at issue at the sentencing phase. On cross-examination, the Commonwealth's attorney had the following exchange with petitioner's psychological expert:

> Q: You have diagnosed an anti-social personality disorder for him; correct?
>
> A: Yes, I have....
>
> Q: One of the features of this is he tends to be irresponsible; correct?
>
> A: Well, one of the features of anti-social personality can be irresponsibility. I don't know if that's necessarily a criteria that fits him. He fits a number of the other criteria.
>
> Q: It can be anti-social behavior; correct?

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25. The Pennsylvania statute governing sentencings of individuals convicted of first degree murder contains no requirement that the jury be informed that life imprisonment means life without the possibility of parole. *See* 42 Pa.C.S. § 9711.

A: Absolutely.

Q: Including criminal activity; correct?

A: Correct.

Q: Lying?

A: Yes.

Q: Stealing?

A: Yes.

Q: Fighting?

A: Yes.

Q: Being very aggressive; correct?

A: Yes.

Q: They can be prone to being irritable; correct?

A: Yes.

Q: Prone to getting repeatedly into physical fights; correct?

A: Can be. What you're doing is reading from the list of criteria, but many of these do apply to him, yes.

Q: Failure to conform to social norms; correct?

A: That is true.

Q: Repeatedly can perform anti-social acts; correct?

A: Yes.

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Q: *And it's something that is sort of a snowball effect: The older they get, they follow down this path, don't they, unless they get treatment?*

A: Well, that's not exactly true. Actually, acting out the part of the anti-social personality tends to burn out in the thirties and into the forties, but the attitudes may still be there.

Q: They also tend to express no remorse, don't they?

A: That's true.

Q: No remorse about the effects of their behavior on other people?

A: They often don't have insight into the effects of their behavior on themselves or other people.

Q: *In other words, a lot of people who have anti-social personality disorders can't play by the rules in a civilized society; correct?*

A: True.

(Sentencing Transcript, April 22, 1994, at 101-104 (emphasis added).) The only issue before the jury was whether Bronshtein deserved a life sentence or execution. This line of questioning clearly could have been viewed by the jury as an attempt to portray Bronshtein as not only a past but a future menace to society. Viewed in the context of the choice facing the jury—life imprisonment or death—the list of negative character traits, reference to repeated social acts,

the comment on the "snowball effect," and the mention of petitioner's inability to "play by the rules in a civilized society" would unquestionably designed to evoke in a reasonable juror's mind the potential danger he would pose to society in the event of his release on parole. The sentencing statute's list of aggravating factors—to which the Commonwealth is limited in seeking a death sentence—contains no mention of the defendant's anti-social behavior or propensity for violence. Thus, there would appear to be little purpose for this line of questioning during the penalty phase of the trial other than to cause the jury to dwell on Bronshtein's future in society.

The prosecutor reminded the jury of this issue in his closing statement at the sentencing phase:

> Ladies and gentlemen, the medical testimony in this case was significant because it tells you something about the psyche and persona of this man. He can't conform to what is required in society. The doctors have told you that he's anti-social. He's prone to lying. He's prone to stealing. He's prone to living a life of crime.
>
> Whatever the seeds were that got him there, they're planted, and that tree has grown. He's grown into a twenty-two-year-old person now regardless of how the seeds were planted.
>
> You have to take a look at what effect that has had and what effect it had at the time he committed these crimes. The doctors have told

> you he's a man that can't conform to the needs of society. He's going to lie. And worse of all, he feels like everybody is trying to blame him for something.

(Sentencing Transcript, at April 22, 1994, at 142-43.) Surely the prosecutor's words relate to past conduct of the defendant and his conduct at the time of the crimes. However, the references to Bronshtein's inability to "conform to what is required in society" and the fact that he was "anti-social," in the context of the present and the future by reference to what Bronshtein is "going to" and "prone to" do, make it clear that the Commonwealth was suggesting to the jury that it should impose the death penalty because of Bronshtein's inability to function in society in the future. The prosecutor's assertion that petitioner was "prone to living a life of crime," when placed in the context of the stark choice of life in prison or death, would suggest to any juror that petitioner would pose a danger to society if he was released from prison. The none-too-subtle implication of these arguments is that Bronshtein should be put to death because if he were ever released, he could not "conform to the needs of society," and was "going to" continue "living a life of crime" and engaging in dangerous, violent conduct. Thus, I conclude that Bronshtein's future dangerousness was placed squarely at an issue in his sentencing.

Finally, despite the fact that the Commonwealth placed petitioner's future dangerousness at issue during the sentencing phase, it is clear from the record that the jury was not informed that a sentence of life imprisonment would mean that Bronshtein would never be released from prison on parole.

This case thus fits the very circumstances that the Supreme Court of the United States found violated the Fourteenth Amendment in *Simmons* and *Shafer*.[26]

Also instructive is the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Trivigno*, 561 Pa. 232, 750 A.2d 243 (2000). In that first degree murder case, the prosecutor encouraged the jury at the sentencing phase to use the defendant's past convictions as a "weather vane" and as an indication of where the defendant was "going." *See id.* at 253, 750 A.2d 243. The majority inferred from those comments that "the arguments of the Commonwealth reasonably infer that the jury was being asked to consider the future dangerousness of *Trivigno* as an aggravating factor." *Id.* The defendant never requested a *Simmons* instruction. Rather, when the jury asked whether a life sentence included a possibility of parole, the trial court told the jury "that is not for your consideration."[27] The supreme

26. The Due Process violation is caused by depriving a criminal defendant an opportunity to rebut evidence advanced by the state by showing that a life sentence was without parole, a fact so important to the jury's consideration that it goes to the heart of the balancing task of the jury between life and death. Thus, by refusing to give the *Simmons* instruction, Bronshtein was deprived of an essential means to counter the implications of the future dangerousness arguments by persuading the jury that life imprisonment was a more appropriate sentence than death. *See Simmons*, 512 U.S. at 164 (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 n. 1, 9, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

27. Even when the jury inquired about the meaning of life without parole, clearly signaling that a *Simmons* instruction was in

(Cont'd)

court held that the trial court had erred in failing to inform the jury that life meant life without the possibility of parole under *Simmons*, observing, "We now hold that when a *Simmons* instruction is required because the prosecution has argued the defendant's future dangerousness, the trial court . . . should inform the jury that a life sentence means that a defendant is not eligible for parole. . . ." *Id.* at 254, 256, 750 A.2d 243.

Trivigno is virtually indistinguishable from this case. The prosecutor's comments at Bronshtein's sentencing phase were, while not explicit in their references to future dangerousness, were at least as evocative of future dangerousness as in *Trivigno* if not more. As in *Trivigno*, Bronshtein's attorney never requested a life-means-life-without-parole instruction. And in both cases, the trial court did not give a *Simmons* instruction. I concur with the Supreme Court of Pennsylvania's determination in *Trivigno* that a failure to give a *Simmons* instruction under such circumstances is an error of constitutional magnitude.[28]

(Cont'd)

order, defense counsel still neglected to request a *Simmons* instruction on the basis of the Commonwealth's future dangerousness argument. Instead, defense counsel stated that the jury's question should be answered. *See Trivigno*, 561 Pa. at 264, 750 A.2d 243 (Castille, J., dissenting). Thus, *Simmons* was never invoked by defense counsel at trial, nonetheless, the Supreme Court of Pennsylvania in its holding found merit in his *Simmons* claim on direct appeal. Likewise, though Bronshtein's counsel never raised *Simmons* at trial, I nevertheless find that his *Simmons* claim has merit.

28. I note that to date, the Court of Appeals for the Third Circuit has not yet had occasion to consider the merits of a *Simmons*-based claim in a federal habeas petition.

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The state court's jury instructions were legal determinations that are entitled to no deference under pre-AEDPA standards. I conclude that as a matter of law, the sentencing instructions regarding life imprisonment, or lack thereof, were erroneous and violated the Due Process Clause of the Fourteenth Amendment. Furthermore, I cannot conclude that the error was harmless; it is clear that there very well could have been a different outcome absent this error. Moreover, under similar circumstances in *Simmons* and *Trivigno,* the Supreme Court of the United States and the Supreme Court of Pennsylvania sent the cases back for new sentencings without conducting a harmless error review, thus indicating that an instructional error under these circumstances is never harmless. Therefore, petitioner is entitled to habeas relief on this claim.

3. Invalid Aggravating Factor

Bronshtein also challenges the application of the aggravating factor set forth in 42 Pa.C.S. § 9711(d)(6) during the sentencing phase of his trial. Section 9711(d)(6) allows the jury to consider as an aggravating factor militating in favor of the death penalty the fact that the "defendant committed a killing while in the perpetration of a felony." Petitioner contends that the evidence presented at trial supported only accomplice or co-conspirator liability, and thus § 9711(d)(6) is inapplicable because there was insufficient proof that he "committed" the killing. He also argues that the instructions given to the jury regarding § 9711(d)(6) were flawed.

Bronshtein relies on *Commonwealth v. Lassiter,* 554 Pa. 586, 722 A.2d 657 (1998), in which the Supreme Court of

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Pennsylvania considered the case of a defendant sentenced to death on evidence that pointed to an accomplice theory of liability. The defendant argued that because the evidence did not show that she actually pulled the trigger, the aggravating factor of § 9711(d)(6) could not apply to her, as it applies only when one "commit[s]" a killing. The Supreme Court carefully analyzed the language of § 9711 and concluded that subsection (d)(6) "may not be applied to an accomplice who does not 'commit' the killing in the sense of bringing it to completion or finishing it." *See id.* at 595, 722 A.2d 657.

Lassiter can only assist Bronshtein if the evidence presented at his trial pointed to an accomplice or co-conspirator theory of liability. A review of the evidence that indicates that Bronsthein was the actual killer reveals its weaknesses. While witnesses and fingerprints placed him at the scene of the murder, there was no evidence that Bronsthein carried a weapon into the store, no evidence connecting him to any weapon found at the scene, and the murder weapon was never recovered. Witnesses placed another individual at the scene with Bronshtein, and there was evidence that a piece of a gun was found at the scene was linked to that individual, not Bronshtein. Bronsthein's fingerprints were not found in the area where the body was discovered.

Even more compelling than the lack of evidence—or perhaps because of it—was the jury's finding at the sentencing phase that there was a possibility that Bronshtein had not pulled the trigger. The jury's finding was revealed during the following colloquy between the trial court and the presiding juror at the close of the sentencing phase:

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COURT: Would you state for the record, please, what mitigating circumstances you found.

JUROR: Yes.

COURT: Or whatever you found.

JUROR: For mitigating circumstances we found extreme mental or emotional disturbance, poor childhood upbringing, and a *possibility that defendant did not pull the trigger.*

(Sentencing Transcript, April 22, 1994, at 205 (emphasis added).) The last finding fell under the statutory mitigating circumstance set forth in § 9711(e)(8): "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." Under Pennsylvania's statutory procedures in cases involving first degree murder, the jury may only find a mitigating circumstance when the defendant has proved that circumstance by a preponderance of the evidence. *See* 42 Pa.C.S. § 9711(c)(1)(iii). This means that the jury found that Bronshtein had proved by a preponderance of the evidence that there was a possibility that he did not actually commit the killing. This finding strongly indicates that the jury believed that there was a reasonable doubt as to whether Bronshtein pulled the trigger, and that the jury's guilty verdict rested on a finding that he more likely was an accomplice or co-conspirator to the killing than the actual killer.

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The Commonwealth contends that the jury finding that there was a possibility that petitioner did not commit the murder should not be accorded significant weight, because it merely indicates that one juror had "residual doubt" as to whether petitioner was the actual killer. (Commonwealth's Response, at 67.) That argument ignores the finding of the entire jury reported by the presiding juror (not merely one juror) that Bronshtein had proved by a preponderance of the evidence that it was possible that he did not pull the trigger.[29] The Commonwealth's argument may be an inelegant attempt to suggest that without conclusive proof that Bronshtein did not pull the trigger, *Lassiter* does not apply here. It is true that in *Lassiter,* the evidence clearly indicated, and there was little dispute, that defendant was at best an accomplice. However, in many ways, the evidence of the defendant's involvement and conduct in *Lassiter* was far more substantial and compelling than in this case. The evidence in *Lassiter* included great detail about the defendant's conduct and motives leading up to and following the killing as well as the killing itself, and demonstrated that the defendant had knowingly and wilfully lured the victim to a particular location where the triggerman laid in wait. By contrast, there is little evidence of what actually took place in this case, and the evidence at best places Bronshtein at the scene and leaves considerable doubt as to how the killing took place, and thus doubt that Bronshtein pulled the trigger. Thus, the evidence that Bronshtein was an accomplice or co-conspirator is not as strong as it was in *Lassiter.*

29. As reflected in the quotation from the record above, the foreperson used the word "we" to characterize the jury's finding of mitigating factors, making it clear that the findings were those of the jury, not merely one juror. (Sentencing Transcript, April 22, 1994, at 205.)

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Even if that the accomplice liability in this case was less clear than in *Lassiter,* I do not believe *Lassiter* is limited only to cases in which accomplice or co-conspirator liability is unmistakable or undisputed. To hold otherwise would be to force a petitioner to prove a very elusive negative at the sentencing phase. It seems clear that the reasoning of *Lassiter* is intended to remove the *possibility* that § 9711(d)(6) would be applied as an aggravating factor in a case resting on a theory of accomplice or co-conspirator liability. Absent a specific jury questionnaire that distinguishes between direct and accomplice liability, there is no means in a criminal case such as this to determine whether a jury has convicted on the basis of accomplice or co-conspirator liability.[30] The only tools that can be relied upon in determining whether an individual was convicted on the basis of accomplice or co-conspirator liability are the evidence presented at trial and other jury findings that point the way. Here, the evidence of direct liability was weak and the foreperson reported a jury finding that Bronshtein had proved to the satisfaction of the jury, by a preponderance of the evidence, that there was a possibility that he did not commit the killing. This finding compels the conclusion that there was some doubt as to whether petitioner actually committed the killing. Therefore, the application to Bronshtein of an aggravating factor that applies only when an individual actually committed the killing was erroneous.

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30. The Commonwealth, by its closing argument in the penalty phase of this case, conceded that there is no way to derive from the jury's conviction for first degree murder whether Bronshtein was convicted as an accomplice, co-conspirator, or the actual shooter. (Sentencing Transcript, April 22, 1994, at 137.)

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I do not today attempt to delineate the minimum amount of evidence or articulate every kind of jury finding required to trigger the *Lassiter* rule barring the application of § 9711(d)(6). Rather, I focus on the record of this case, which includes weak evidence that petitioner pulled the trigger and a clear jury finding that there was a possibility that Bronshtein did not actually kill the victim. The most reasonable inference that can be drawn from this jury finding is that proof was lacking with respect to whether Bronshtein himself committed the killing. I conclude that the real possibility, based upon the paucity of the evidence as illuminated by this finding, that Bronshtein was convicted as an accomplice or co-conspirator is enough to trigger protections of *Lassiter* and render the application of § 9711(d)(6) to Bronshtein erroneous and invalid.

The Supreme Court of the United States has held that in a "weighing" state such as Pennsylvania,[31] "there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Sochor v. Florida*, 504 U.S. 527, 532, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (citing *Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)). The Supreme Court has long held

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31. "Weighing states" are states in which the death-penalty law sets forth aggravating and mitigating circumstances, and the jury decides which aggravating circumstances exist and which mitigating circumstances exist and imposes life imprisonment if it decides that the mitigating circumstances outweigh the aggravating circumstances or it imposes death if it decides that the aggravating circumstances outweigh the mitigating circumstances. *See Jermyn v. Horn*, No. 97-634, 1998 U.S. Dist. LEXIS 16939, at *7 (M.D.Pa.1998).

that the Eighth Amendment, requires both "measured consistent application and fairness to the accused." *Eddings v. Oklahoma,* 455 U.S. 104, 110-112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 601-605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), and that applying an invalid aggravating factor violates the Eighth Amendment in that it " 'creates the possibility of . . . randomness' by placing a 'thumb [on] death's side of the scale.' " *Sochor,* 504 U.S. at 532 (citations omitted).

The decision of the Supreme Court of Pennsylvania in *Lassiter* makes it clear that § 9711(d)(6) is invalid when applied to a case based substantially on an accomplice or co-conspirator liability theory. There is no question that in this case, § 9711(d)(6) was applied to petitioner, and there are clear indications that the jury considered him to be merely an accomplice or co-conspirator or that there was reasonable doubt that he actually shot and killed the victim. Therefore, I conclude that the sentencer in Bronshtein's case weighed an invalid aggravating circumstance in deciding to impose the death sentence, and therefore the sentence violated his rights under the Eighth Amendment.

The state court's jury instructions were legal determinations or mixed considerations of law and fact that are entitled to no deference under pre-AEDPA standards.[32] I conclude that as a matter of law, the sentencing instructions regarding aggravating and mitigating favors were erroneous and violated the Eighth Amendment. I cannot conclude that

32. At most, the trial court's failure to adhere to the dictates of *Lassiter* presents a mixed question of law and fact, which again is reviewed *de novo* under pre-AEDPA standards.

this error was harmless; the jury found two aggravating factors and three mitigating factors; it seems axiomatic that *sans* one of those aggravating factors, the balance could very well have tipped in favor of Bronshtein and resulted in a sentence that would have spared his life. Therefore, petitioner is entitled to habeas relief on this claim.[33]

Conclusion

The foregoing analysis demonstrates that petitioner's claims are not procedurally barred, and that he is entitled to habeas relief under 28 U.S.C. § 2254 on a number of grounds. Both petitioner's conviction and sentencing for first degree

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33. Bronshtein has raised a number of other claims in his petition. Specifically, he has claimed that (1) the jury instruction as to specific intent was erroneous; (2) evidence that another person committed the crime was improperly excluded; (3) evidence that he committed another crime was improperly admitted; (4) prosecutorial misconduct rendered the guilt phase of the trial unfair; (5) the only juror of a similar ethnic background to petitioner was improperly excluded; (6) the prosecutor engaged in unconstitutional misconduct during the sentencing phase; (7) the instruction on aggravating and mitigating factors impermissibly undermined the importance of mitigating factors; (8) an aggravating factor was based on an invalid prior felony conviction; (9) the aggravating factor involving prior felony conviction involving threat or use of violence is unconstitutionally vague; (10) the Supreme Court of Pennsylvania violated petitioner's right to meaningful appellate review in its proportionality review; (11) counsel were ineffective; and (12) cumulative constitutional errors during trial and sentencing warrant relief. Because I have concluded that there are three claims upon which petitioner is clearly entitled to relief in the form of a new trial and sentencing, I need not and do not reach any conclusions as to the merits of these other claims.

murder were the product of state jury instructions that contained errors of a constitutional magnitude.[34] There is no relief short of a new trial and sentencing that would remedy these constitutional errors. Therefore, I will vacate the conviction and sentencing of defendant for first degree murder[35] and, unless the Commonwealth grants Bronshtein a new trial and sentencing in 180 days, the writ shall issue.

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34. Federal courts have the discretion of whether or not to grant hearings on petitions filed under 28 U.S.C. § 2254. *See Campbell v. Vaughn*, 209 F.3 280, 287 (3d Cir.2000). Because the issues have been comprehensively briefed and because the material facts are not in dispute and no further evidence is required for the Court to reach its conclusions on the claims addressed herein, I concluded a hearing would not be necessary or helpful in reaching a decision on the merits of petitioner's claims. Therefore, in the exercise of my discretion, I will not hold such a hearing.

35. The petitioner does not argue that his convictions for robbery, theft, and conspiracy were constitutionally flawed, and therefore the Court does not consider those convictions today.

APPENDIX D — OPINION OF THE SUPREME COURT OF PENNSYLVANIA FOR THE EASTERN DISTRICT DATED JUNE 19, 2000

[J-94-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

284 Capital Appeal Docket 2000

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTUAN BRONSHTEIN,

Appellant

Appeal from the order of the Court of Common Pleas, Montgomery County dated October 19, 1999 at No. 3279-93, denying relief under the Post-Conviction Relief Act

SUBMITTED: March 31, 2000

OPINION

MR. JUSTICE NIGRO DECIDED: June 19, 2000

Appellant Antuan Bronshtein appeals from the order of the PCRA court dismissing as untimely his amended petition for habeas corpus relief and for post-conviction relief under

the Post Conviction Relief Act ("PCRA").[1] For the reasons set forth below, we affirm.

In 1994, a jury convicted Appellant of first-degree murder, robbery, theft of movable property, possession of an instrument of crime and criminal conspiracy to commit murder.[2] Following a sentencing hearing, the jury found two aggravating circumstances and three mitigating circumstances, and after weighing them, returned a sentence of death. On direct appeal, this Court affirmed. *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907 (1997). Appellant then petitioned for writ of certiorari to the United States Supreme Court and certiorari was denied on October 20, 1997. *Bronshtein v. Pennsylvania*, 522 U.S. 936, 118 S.Ct. 346, 139 L.Ed.2d 269 (1997).

The Governor signed a warrant of execution on November 14, 1997. On December 3, 1997, the Center for Legal Education Advocacy and Defense Assistance (CLEADA) filed an emergency motion for stay of execution and a PCRA petition. The PCRA court issued a stay of execution pending the disposition of the PCRA petition. On January 26, 1998, Appellant wrote a letter to the PCRA court indicating his desire to abandon his PCRA appeal. After a hearing, the PCRA court found that Appellant had knowingly, intelligently and voluntarily waived his right to appeal and therefore entered an order dismissing the PCRA

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1. 42 Pa.C.S. § 9541 *et seq.*

2. A detailed recitation of the underlying facts can be found in this Court's opinion reviewing this case on direct appeal. *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907, 911-12 (1997).

petition and vacating the stay of execution. On appeal, this Court affirmed. *Commonwealth v. Bronshtein*, 556 Pa. 545, 729 A.2d 1102 (1999).

On April 26, 1999, Appellant's mother and sister, as Appellant's next friends, filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania and Appellant sought a stay of execution. After a hearing, the District Court stayed the execution and granted Appellant until August 27, 1999 to file his own habeas corpus petition. Instead, on June 9, 1999, Appellant filed the instant PCRA petition.[3] The PCRA court

3. Although Appellant's petition was filed as an "Amended Petition for Habeas Corpus Relief under Article I, Section 14 of the Pennsylvania Constitution and for Statutory Post-Conviction Relief Under the Post-Conviction Relief Act," his petition for habeas corpus relief will be subsumed into the discussion of his PCRA petition given that the PCRA specifically states: "The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including habeas corpus and coram nobis." 42 Pa.C.S. § 9542; *see also Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638, 639-40 ("The essence of these three sections [§§ 9542, 9545 and 6503 (relating to habeas corpus)], when read together, is that the PCRA subsumes the remedy of habeas corpus with respect to remedies offered under the PCRA. . . .").

Furthermore, although Appellant called his petition an "amended" petition, the PCRA court correctly noted that the petition was actually Appellant's second PCRA petition, not an "amended petition." Appellant's first petition was dismissed at his own behest and that decision was affirmed by this Court on appeal. *See Bronshtein*, 556 Pa. 545, 729 A.2d 1102 (1999).

determined that it lacked jurisdiction to entertain Appellant's petition because Appellant's "post-conviction relief rights ha[d] been irrevocably waived" and because the petition had been untimely filed. PCRA Ct. Op., 10/19/99, at 2, 4. Appellant's instant appeal followed.[4]

In his first issue, Appellant claims that the PCRA court erred in finding that his petition was untimely filed. We disagree.

On November 17, 1995, the General Assembly amended the PCRA to require, as a matter of jurisdiction, that petitions brought pursuant to the PCRA be filed within one year of the date that the petitioner's judgment becomes final. 42 Pa.C.S. § 9545(b).[5] A judgment becomes final at the end

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4. Pursuant to § 9546(d) of the PCRA, the denial of post-conviction relief in a capital case is directly appealable to this Court. 42 Pa.C.S. § 9546(d); *see also Commonwealth v. Morales*, 549 Pa. 400, 701 A.2d 516, 519 n. 2 (1997). When reviewing the denial of post-conviction relief, this Court is limited to "examining whether the lower court's determination is supported by the evidence of record and whether it is free of legal error." *Commonwealth v. Morales*, 549 Pa. 400, 701 A.2d 516, 520 (1997).

5. Section 9545(b) of the PCRA states in relevant part:

> **(b) Time for filing petition.—**
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final. . . .

42 Pa.C.S. § 9545(b)(1).

of direct review, including discretionary review to the Supreme Court of the United States. 42 Pa.C.S. § 9545(b)(3).[6]

Here, Appellant's judgment became final on October 20, 1997, the date that the United States Supreme Court denied certiorari. Thus, Appellant was required to file his petition for post-conviction relief within one year of October 20, 1997, that is by October 20, 1998, in order for his PCRA petition to be timely filed. Instead, Appellant filed this, his second, petition for post-conviction relief on June 9, 1999, well beyond the one-year limit prescribed by § 9545(b)(1).

The PCRA does, however, provide for limited exceptions to the one-year filing requirement. A petition for post-conviction relief filed after the one-year deadline may be deemed timely where a petitioner pleads and proves that: (1) the failure to raise the claim earlier was due to the interference of government officials; (2) the claim is predicated on facts that were unknown to the petitioner and could not have been discovered with due diligence; or (3) the right asserted was recognized by the United States Supreme Court or Pennsylvania Supreme Court as a constitutional right after the petitioner's case was decided

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6. Section 9545(b)(3) provides:

> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

and the right has been held to apply retroactively. 42 Pa.C.S. § 9545(b)(1).[7] A petition alleging one of the above exceptions must also be filed within sixty days of the date that the claim could have been presented. 42 Pa.C.S. § 9545(b)(2). Furthermore, it is the petitioner's burden to plead and prove that one of the exceptions applies. 42 Pa.C.S. § 9545(b)(1); *see also Commonwealth v. Beasley*, 559 Pa. 604, 741 A.2d 1258, 1261 (1999).

Petitioner argues that his petition falls within the exception set forth at § 9545(b)(1)(ii), that is, that the facts upon which his claims are predicated were unknown to him and could not have been known to him through the exercise

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7. Section § 9545(b)(1) states that a petition filed after the one-year limit must prove that:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by the court to apply retroactively.

42 Pa.C.S. § 9545(b)(1).

of due diligence. Specifically, he asserts that the facts underlying his claims were unknown to him because his counsel was ineffective. Thus, he argues, he could not have known that his claims were possibly meritorious or that his counsel was ineffective until he obtained new counsel to review his claims.

This Court rejected this precise argument in *Commonwealth v. Pursell*, 561 Pa. 214, 749 A.2d 911 (2000). In *Pursell*, we stated:

> [T]he 42 Pa.C.S. § 9545(b)(1)(ii) exception does not apply where the petitioner merely alleges that more competent counsel would have presented other claims based on a better evaluation of the facts available to him or her at the time of trial, and we reject Appellant's contention that the 'facts' which form the bases of these claims were not knowable until he was advised of their existence by present counsel.

Pursell, 561 Pa. 214, 749 A.2d 911, 917 (2000).

Thus, as *Pursell* makes clear, couching a claim in terms of ineffectiveness of prior counsel does nothing to establish the exception set forth in § 9545(b)(1)(ii). Therefore, Appellant's argument that his claims fall within the timeliness exception in § 9545(b)(1)(ii) necessarily fails. Accordingly, we agree with the PCRA court that Appellant's petition is untimely, leaving this Court without jurisdiction to reach Appellant's issues. The order of the PCRA court is therefore affirmed.[8]

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8. The Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor.

Appendix D

Judgment entered
Dated: June 19, 2000

s/ [illegible]
Deputy Prothonotary

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 13, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 01-9004/9005

ANTUAN BRONSHTEIN

v.

MARTIN L. HORN, Commissioner, Pennsylvania Department of Corrections

MARTIN HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; *JAMES PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; **GERALD J. PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA,

Appellants, No. 01-9004

*(Pursuant to Rule 12(a), F.R.A.P.)

**(Amended in accordance with Clerk's Order dated 6/23/04)

Appendix E

ANTUAN BRONSHTEIN,

Appellant, No. 01-9005

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; *JAMES PRICE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ROCKVIEW; **GERALD J. PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA

*(Amended in accordance with Clerk's Order dated 8/29/01.)
**(Amended in accordance with Clerk's Order dated 6/23/04.)

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, and VAN ANTWERPEN, *Circuit Judges*, and STAPLETON, *Senior Circuit Judge**

The petition for rehearing filed by appellee/cross-appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

* As to panel rehearing only.

circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judges Nygaard and McKee would have granted rehearing.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: June 13, 2005